Supreme Court, U.S.
FILED
JUL 12 1994
OFFICE OF THE CLERK

No. 94 140

In The Supreme Court of the United States

October Term, 1994

AMIR PORAT,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Theodore Simon
2400 Architects Bldg.
117 S. 17th Street
Philadelphia, PA 19103
(215) 563-5550

Counsel for Petitioner Porat

QUESTIONS PRESENTED

1. Was Petitioner's Fifth and Sixth Amendment Rights to due process, confrontation, and jury trial violated where an essential element of the offense materiality, was not submitted to the jury violating In Re Winship and it's progeny?

2. Was Petitioner's Fifth and Sixth Amendment rights violated where the government failed to prove the essential element, materiality, beyond a reasonable doubt?

3. Did the district court act within the time honored inherent, historical, and statutory broad discretion in sentencing Petitioner to serve the home detention portion of his sentence in Israel?

4. Was Petitioner denied a fair trial when irrelevant overly prejudicial and unreliable hearsay "other crimes" evidence in the nature of antitrust violations was admitted and where Petitioner was denied the opportunity to prove his good character in violation of Michelson v. United States?

TABLE OF CONTENTS

	Page
Questions Presented	i.
Table of Authorities	ii-ix.
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ. . .	13
1. Petitioner's Fifth and Sixth Amendment Rights to due process, confrontation, and jury trial were violated where an essential element of the offense, materiality, was not submitted to the jury violating In Re Winship and it's progeny.	13
2. Petitioner's Fifth and Sixth Amendment rights were violated where the government failed to prove the essential element, materiality, beyond a reasonable doubt.	23
3. The district court acted within the time honored inherent, historical, and statutory broad discretion in sentencing Petitioner to serve the home detention portion of his sentence in Israel.	30

4. Petitioner was denied a fair trial when irrelevant overly prejudicial and unreliable hearsay "other crimes" evidence in the nature of antitrust violations was admitted and where Petitioner was denied the opportunity to prove his good character in violation of Michelson v. United States. 40

Conclusion 46

Appendix A

Opinion, Third Circuit Court of Appeals A1-22

Order, Third Circuit Court of Appeals denying Petition for Rehearing A23-24

Memorandum and Order U.S. District Court A25-54

U.S. District Court Judgment and Commitment Order A55-56

TABLE OF AUTHORITIES

Cases:	Page
Boujaily v. U.S., 483 U.S. 171, at 181	42,43
Cabana v. Bullock, 474 U.S. 376, 384-85 (1986)	15
Cage v. Louisiana, 498 U.S.___, ___ 111 S.Ct. 328, 329, 112 L.Ed. 2d 339, 341 (1990)	21
Carella v. California, 491 U.S. 263, 268-69 (1989)	15,16, 17,21
Commonwealth v. McDuffee, 398 N.J. 2d 463, 469-70)	14
Duncan v. Louisiana, 391 U.S. 148 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968)	15,16
Gov't of the Virgin Islands v. Archibald, 987 F.2d 180 (3rd. Cir. 1993)	46
Huddleston v. U.S., 445 U.S. 681, 108 S.Ct. 1496, (1988)	43
In re Winship 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	13,14,20 21,23

TABLE OF AUTHORITIES

Cases:	Page
Kungys v. U.S., 485 U.S.759, 108 S.Ct. 1537, 1547, 99 L.Ed. 2d 839, 854 (1988)	18,19.20
Luria v. United States, 231 U.S. 9, 27-28, 34 S.Ct. 10, 15, 58 L.Ed. 101, 107 (1913)	18
Michelson v. U.S., 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948)	43
People v. Hedgecock, 795 P.2d 60 (Cal. 1990)	14
Sandstrom v. Montana, 442 U.S. 510, 520-21 (1979) . . .	15
Sinclair v. United States, 279 U.S. 263 (1929)	14,17,18
State v. Anderson, 603 A.2d, 928 (NJ 1992)	14,21
Sullivan v. Louisiana, 113 S.Ct. 2078, 2082 (1993)	15,16,20
U.S. v. Bednar, 728 F.2d at 1047	24
U.S. v. Bradley, 5 Fed. 3rd 1317, 1320 (9th Cir. 1993)	45

TABLE OF AUTHORITIES

Cases:	Page
U.S. v. Brimberry, 779 F.2d 1139 (9th Cir. 1985)	24
U.S. v. Brumley, 560 F.2d 1268 at 1278 (5th Cir. 1977)	26
U.S. v. Carty, 993 F.2d 1005, 1011 (1st 1993)	44
U.S. v. Crocket, 568 F.2d 1049 (3rd Cir. 1977)	29
U.S. v. Doulin, 538 F.2d 466 (2d Cir. 1976) . . .	26
U.S. v. Flores, 5 Fed. 3rd 1070, 1080 (7th Cir.	45
U.S. v. Gaudin, 1994 WL 271930 (9th Cir., June 21, 1994)	13,14,18 19,22
U.S. v. Gessa, 971 F.2d 1257, 1261-62 (6th Cir. 1992)	46
U.S. v. Goguen, 723 F.2d 1012, 1019 (1st Cir. 1983)	26

TABLE OF AUTHORITIES

Cases: Page

U.S. v. Gordon,
987 F.2d 902, 908 (2nd Cir.
1993) 44

U.S. v. Greber,
760 F.2d 68 (3d Cir. 1985) 14

U.S. Hussong,
778 F, id. 567, 589-70
(10th Cir. 1985) 36

U.S. v. Jalilian,
896, F.2d 447, 448 (10th Cir.
1990) 36

U.S. v. Lasater,
535 F.2d 1041, 1046 (8th Cir.
1976) 27

U.S. v. Logan,
717 F.2d 84 (3rd. Cir. 1983) . . . 43

U.S. v. Mehremanesh,
689 F.2d 822, 830 (9th Cir.
1982) 46

U.S. v. Mayans,
No.92-505630, Slip Op.
1603, 1616 (9th Cir.
Feb. 9, 1994) 46

U.S. v. McMillon,
14 F.2rd 948 (4th Cir.
1994) 45

TABLE OF AUTHORITIES

Cases:	Page
U.S. v. Pearce, 428 F.Supp. 1328 (E.D. Pa. 1977)	26
U.S. v. Polchlopek, 897 F.2d 997, 998 (9th Cir. 1990)	38
U.S. v. Porat, 17 F.3d 660 (1994)	1
U.S. v. Pugliese, 960 F.2d, 913, 914 (10th Cir. 1992)	36,37
U.S. v. Ridlehuber, 11 Fed. 3rd, 516, 522 (5th Cir. 1990)	44
U.S. v. Roenigh, 810 F.2d. 809 (8th Cir. 1990)	40
U.S. v. Sampson, 980 F.2d 883, 886 (3rd Cir. 1992)	45,46
U.S. v. Slawik, 548 F.2d 75 (3rd Cir. 1977)	14,23,29
U.S. v. Sparks, 1994 WL 177450 (4th Cir. 1994)	45

TABLE OF AUTHORITIES

Cases:	Page
U.S. v. Taylor, 693 F.Supp. 820, 830-47, (N.D. Cal. 1988)	14
U.S. v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979)	17
U.S. v. Walliford, 764 F.2d 1493 (11th Cir. 1985)	40
U.S. v. Wright, 16 F.3rd 1429 (6th Cir. 1994)	46
Yates v. Evatt, 500 U.S.----, ----, 111 S. Ct. 1884, 1891 (1991) . . .	15
Statutes:	
18 U.S.C. §192	17
18 U.S.C. §1001	13
18 U.S.C. §1623	2,3,23,40
18 U.S.C. §3553(a)(1)	33
18 U.S.C. §35539a)(2)	37
18 U.S.C. §3553(a)(2)(B)	37
18 U.S.C.§3553(a)(2)(C)	37
18 U.S.C. §3553(a)(2)(D)	37
18 U.S.C. §3563	34

TABLE OF AUTHORITIES

Cases:	Page
18 U.S.C. §3563(b)	37
18 U.S.C. §3563(b)(1) through (b)(10)	34
18 U.S.C. §3563(b)(12 through (b)(20)	34
18 U.S.C. §3563(d)	37
18 U.S.C. §3583	33,35
18 U.S.C. §3583(d)	35,37
18 U.S.C. §3586	35
18 U.S.C. §3601.	35
18 U.S.C. §3621	39
18 U.S.C. §3651	31
18 U.S.C. §5031	35
28 U.S.C. §994(a)	35
28 U.S.C. §1254(1)	2
United States Sentencing Guidelines:	
U.S.S.G. §5B1.3	33
U.S.S.G. §5B1.4	37
U.S.S.G. §5C1.1	32

TABLE OF AUTHORITIES

Cases: Page

U.S.S.G. §5C1.1b(1) 32

U.S.S.G. §5D1.3 36

U.S.S.G. §5F1.2 33

OPINIONS BELOW

On March 3, 1994 the U.S. Court of Appeals for the Third Circuit filed an opinion, which is reproduced in Appendix A, infra, pages A1-A22, affirming the judgment of conviction, entered by the U.S. District Court for the Eastern District of Pennsylvania, however, vacated that part of the sentence which permitted Petitioner to serve the five months home detention in Israel and remanded for resentencing to provide that the home detention be served in the U.S. On April 14, 1994 the Third Circuit denied Petitioner's Petition for Rehearing, Appendix A, infra, A23 - A24.

On January 19, 1993 the Honorable Norma L. Shapiro, sentenced Petitioner to a split sentence, 5 months incarceration in the U.S. and 5 months home detention in Israel. On January 5, 1993, Judge Shapiro had filed an opinion and order denying post trial motions, and which is reproduced in Appendix A, infra, pages A 25 - A 54. A copy of the judgment and commitment order is reproduced as Appendix A, infra, pages A55 - A56.

JURISDICTION

The opinion and order of the U.S. Court of

Appeals for the Third Circuit (Appendix A, infra A1-A21) affirming the judgment of conviction but vacating the home detention aspect of the sentence, was finally entered on April 14, 1994 after the Petition for Rehearing was denied. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in part:

> .... the accused shall enjoy the right to a speedy and public trial, by an impartial jury....; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

18 §1623. False declarations before grand jury or court:

> (a) however, under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . .

STATEMENT OF THE CASE

On March 3, 1992, Amir Porat, an Israeli citizen, prosecuted by the Antitrust Division of the U.S. Department of Justice, was indicted by a federal grand jury sitting in the Eastern District of Pennsylvania charging him in two counts with making a false statement to a grand jury on May 17, 1989, in violation of 18 U.S.C. 1623.

The indictment alleges that the government was then investigating alleged antitrust violations, specifically, whether Amir Porat and his company I.M., Inc. ("I.M.") had engaged with Fraass Survival Systems, Inc. ("Fraass") in bidrigging on U.S. military bandage contracts between 1983-1986 on bids submitted to the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense (DPSC) in Philadelphia, Pennsylvania.

The indictment charged that it was material to the grand jury's investigation to determine Amir Porat's relationship with Fraass during the aforementioned time period, 1983-86, in which Fraass and I.M.Inc., submitted bids against each other on the aforesaid

military bandage contracts.

Count One charged it was material to the grand jury to determine whether Amir Porat received a certain $200,000 check issued by Fraass to Credit Suisse on or about December 19, 1984. Count two charged it was material to the grand jury to determine if Porat had a bank account in Switzerland. The government alleged he denied falsely receiving the specified check and having a bank account in Switzerland.

In May 1992, Amir Porat was arrested, admitted to bail, and permitted to travel between Israel and the United States pending trial.

A jury trial was held from October 20 to October 26, 1992. The jury deliberated over two days, before reaching a verdict of guilty on count two. The jury was hung on count one and the district court ordered a mistrial as to that count. Post trial motions were denied on December 4, 1992.

On January 19, 1993, Mr. Porat was sentenced, inter alia, to the custody of the Attorney General for five (5) months and to home confinement in Israel for five (5) months (judgment entered on January 20, 1993).

Mr. Porat timely filed a notice of appeal, and on February 2, 1993 the court held a hearing and permitted Mr. Porat to remain on bond pending final disposition of his appeal with travel restricted to the U.S. and Israel.

The government filed a cross appeal.

On March 3, 1994 the Third Circuit affirmed the conviction but reversed the aspect of the sentence permitting house arrest in Israel. On April 14, 1994 a rehearing was denied.

STATEMENT OF THE FACTS

At the time the Government questioned Mr. Porat, on May 17, 1989, the Government had convicted and sentenced Colin Offenhartz (5 years incarceration), the president of Fraass, for conspiracy, antitrust and false statement violations. He agreed that he had, by letter, abrogated an alleged worldwide conspiracy agreement into which he had allegedly entered with Porat in 1979 (10 years before Porat testified). He made a "deal" with the Government and, among other things, received immunity for the obstruction of justice (shredding documents) and perjury committed at his trial.

Offenhartz claimed that Porat conferred with Anthony Siragusa, Offenhartz' partner, on collusive bidding in the U.S regarding military bandage contracts at Defense Personnel Support Center. By then, Mr. Siragusa was dead. Even with this information and despite years of previous investigation, no indictment or charge was ever brought against Mr. Porat for an antitrust violation. The grand jury heard much evidence that no such arrangement existed.

Offenhartz further claimed in his grand jury testimony and in his trial testimony that he gave Porat a certain check, which check was in payment for information on an Israeli contract with the Israeli Government. He testified that the check was negotiated through a coded Swiss bank account. Offenhartz testified that this payrnent was for a contract he obtained with the State of Israel, after Porat allegedly told him the price. This event, if believed, as told by Offenhartz, was an internal and domestic matter for the State of Israel. It had nothing to do with bidding on U.S. Military bandage contracts, and therefore not material to the grand jury investigation.

Offenhartz did not like Porat and was angry at him. Among other things, he did not like that I.M. was in the United States, that he and Porat were competitors, or the protests lodged by I.M and directed at him.

In addition to the plea agreement, the government assisted in obtaining the earliest parole for Offenhartz, requested a prison transfer for him, and after his release, requested of his parole officer that he be granted permission to travel internationally to a business conference in Europe.

There was much evidence before the grand jury that no antitrust violations existed. Bernard Laderman, then Vice President of I.M., Inc., testified that no such bid rigging arrangement existed. Offenhartz agreed. Given the small office, the employees would have to have known, if any bidrigging arrangement existed.

In effect the question of an agreement to violate the antitrust law in bids with DPSC on the 1983-86 military bandage contract became no more than the word of Offenhartz based on the hearsay statements of the deceased Siragusa. During the relevant period I.M.'s bid prices were continually falling

and it ultimately won contracts, it protested against Fraass unfair competition to the DPSC, made claims against Fraass and conducted itself as a competitor.

In a pretrial hearing, the government sought to introduce evidence of the "background" of the $200,000 check. The background of the check is not the background of the offense, which in this case was an alleged false statement to a grand jury. The government wished to introduce evidence of a worldwide conspiracy to violate the antitrust laws. It sought to introduce evidence that Offenhartz and Porat allegedly agreed not to bid in each other's native market. Offenhartz, an American, living in the U.S., was not to bid in Israel and Porat, an Israeli then living in Israel, was not to bid in the U.S. It was unlike the alleged conspiracy the grand jury was investigating, i.e. companies engaged in collusive bid rigging on the same contracts. At the pretrial hearing argument, the government did not advise the court that their evidence would comprise evidence dating to 1977, 1978 and 1979 of this purported agreement. The court in the absence of this information, and in the absence of information that there were substantial other lawful

reasons why these two businessmen did not bid in each other's markets, and in the further absence of the information that the government was aware of substantial written repudiations of any such agreement, ruled that such evidence was admissible. The court stated that its prejudicial value did not outweigh its probative effect. However, the court did not articulate its reasoning. Significantly, at trial there was no evidence of any communication between the parties after the repudiation of the purported "worldwide agreement". It is not until four (4) years later, in November 1983, after I.M. was in the U.S. for two years, and after it made it's first bid on a U.S. contract, that Offenhartz asked Siragusa to call Amir Porat. Offenhartz admits there was no communication or colluded bid on this November 1983 bid. If there was an agreement, why was there no communication prior to this bid? If there was an agreement why was there no evidence of any communication between 1979-1983? In addition, Offenhartz acknowledged that I.M. could not obtain the Israeli contract because the Israelis viewed I.M. as an Israeli company and the contract had to go to an American company.

Offenhartz further testified he made his first offer ($2.19) to the Israeli's without prior consultation with Amir Porat. Offenhartz testified he did not do business with the Israeli's because they had been "very unpleasant". He had not done business with the Israeli's since the "mid-70's". Obviously, the mid-70's was well prior to the purported "worldwide conspiracy".

The government additionally sought to introduce a second grouping of other crimes evidence of a purported bidrigging agreement in the U.S. regarding bids at the DPSC. However, with regard to the other crimes evidence concerning the DPSC bids, the court did not rule that its probative value outweighed its prejudicial effect as required by F.R.E. 403 nor did it provide a reasoned basis.

Porat, in the face of this antitrust evidence[1] , defended the charge on trial by asserting that Offenhartz was not credible[2] and that Offenhartz had not given him the check in issue. (Count One, the jury

[1] Petitioner after having his pretrial and trial objections overruled regarding this antitrust and other crimes evidence was compelled to rebut it.

[2] It should be noted that Offenhartz on the morning of October 21, 1992, prior to retaking the witness stand, engaged in a private communication with one of the jurors. His lack of candor was evident.

hung.) He further asserted that the Swiss bank account was secretly opened without his knowledge, but in his name, by his brother, Michael Porat. Amir Porat attempted to show that his brother Michael (Micki) did this because Israeli citizens who are residents of Israel are not permitted to have out-of-country bank accounts. Amir Porat was then a resident in the U.S. The court did not permit Mr. Porat to prove this important information through his investigator.

In the grand jury, Porat agreed to sign a release and consent to permit the U.S. authorities to obtain any Swiss banking documents. The government's request required the signature of Amir Porat's brother, Michael Porat, as well. Yael Azoulay testified that Amir Porat and Michael Porat had a good relationship until the middle of 1989. The "turning point" came when Amir Porat wanted Michael Porat to sign the consent release forms and Michael Porat refused. This resulted in breaking up their lifelong partnership. Dr. Avi Porat, testified to the irreconcilable breakup. He testified that there was this severe disagreement between the two other brothers which resulted in an arbitration in October 1989.

The government called Sturzinger, an employee of the bank in New York who previously worked in Switzerland but not in the branch or city where the account was located (Zurich). Porat introduced evidence that a Swiss account could be opened in the name of another person and without their knowledge. While a prosecution witness, Sturzinger a banking official suggested one would have to provide sufficient identification, such as a passport, to open an account, he later admitted that if a person was known to the banking officials, or banking officials in an associated bank in another country, then that might not be necessary. Mr. Porat, acting pro se, conceded in his opening statement that the signatures on the accounts were his, not contesting that issue.

Porat presented an unrebutted fingerprint expert, who testified that fingerprints could be detected in 1989 from a touching of a check in 1984. Offenhartz testified he gave the check directly to Mr. Porat and that it was not in an envelope.

Mr. Porat sought to present character testimony through Bernard Laderman. The trial court did not permit the admission of such evidence.

REASONS FOR GRANTING THE WRIT

1. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS TO DUE PROCESS, CONFRONTATION AND JURY TRIAL WERE VIOLATED WHERE AN ESSENTIAL ELEMENT OF THE OFFENSE, "MATERIALITY", WAS NOT SUBMITTED TO THE JURY VIOLATING IN RE WINSHIP AND ITS PROGENY

There exists an irreconcilable inter circuit split of authority on the fundamental question of whether the element of materiality is a question of fact that must be determined by a jury. The instant case presents this ripe issue for resolution.[3]

Recently the Ninth Circuit Court of Appeals held that the element of materiality in 18 U.S.C. §1001 is a question of fact that must be determined by the jury. U.S. v. Gaudin, 1994 WL 271930 (9th Cir. June 21, 1994).

In Gaudin, the Ninth Circuit recognized, as did Petitioner in the District Court and Third Circuit, that most cases continue to hold that materiality is a question of law for the court, relying on dicta in Sinclair v. United States, 279 U.S. 263 (1929), without discussing the impact of In Re Winship,397 U.S. 358,

[3] Porat raised this issue pre-trial and it was denied. A jury instruction was submitted and objection interposed.

90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Petitioner relied upon U.S. v. Taylor, 693 F.Supp. 820, 830-47, (N.D. Cal. 1988) and N.J. v. Anderson, 603 A.2d 928 (N.J. 1992), as did the Ninth Circuit in Gaudin. Also see, Commonwealth v. McDuffee, 398 N.J. 2d 463, 469-70); People v. Hedgecock, 795 P.2d 60 (Cal. 1990) The Third Circuit in U.S. v. Slawik, 548 F.2d 75, (3rd Cir. 1977) (holding materiality is an essential element of the offense in a 18 U.S.C. 1623, perjury prosecution, but is a matter of law and does not have to be submitted to the jury) and U.S. v. Greber, 760 F.2d 68 (3rd Cir. 1985) (holding materiality is an essential element of a 18 U.S.C. 1001, false statement protection but does not have to be submitted to the jury) built on U.S. v. Sinclair, rather than In Re Winship, which it is submitted controls, as was done in U.S. v. Gaudin, supra, U.S. v. Taylor, supra, and State v. Anderson, supra.

The Supreme Court stated, in the oft-quoted opinion of In re Winship, 397 U.S. 358, 364 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof [to a proper factfinder] beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.

This imperative is further compelled by later developments by the Supreme Court. See, e.g., Sandstrom v. Montana, 442 U.S. 510, 520-21 (1979); Cabana v. Bullock, 474 U.S. 376, 384-85 (1986); Carella v. California, 491 U.S. 263, 268-69 (1989) (Scalia, J., concurring); Yates v. Evatt, 500 U.S. ----, ---- , 111 S. Ct. 1884, 1891 (1991); Sullivan v. Louisiana, 113 S.Ct. 2078, 2082 (1993). It is clear from this authority that under the Sixth Amendment the proper factfinder in serious criminal offenses is the jury. The Court in Cabana stated:

A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 745 S.Ct. 1444, 20 L.Ed 2d. 491 (1968) and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. Cabana, 474 U.S. at 384-85 (citation omitted).

In Sullivan, the Court stated:

The Sixth Amendment provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. .

. . .' In Duncan v. Louisiana, 391 U.S. 145, 149 (1968), we found this right to trial by jury in serious criminal cases to be 'fundamental to the American scheme of justice,' and therefore applicable in state proceedings. The right includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' (citations omitted) Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. (citations omitted)

What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. (cases omitted.) The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder 'beyond a reasonable doubt' of the facts necessary to establish each of those elements. (citations omitted)

The quoted summary in Sullivan makes clear that the jury must decide 'the facts necessary to establish each [element of the crime].' Justice Scalia has noted in his concurrence in Carella, the jury's fact-finding function is a structural matter that the Constitution guarantees.

The constitutional right to a jury trial embodies 'a profound judgment about the way in which law should be enforced and justice administered.' It is a structural guarantee that 'reflect[s] a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of

judges.' A defendant may assuredly insist upon observance of this guarantee even when the evidence against him is so overwhelming as to establish guilt beyond a reasonable doubt. That is why the Court has found it constitutionally impermissible for a judge to direct a verdict for the State.
Carella, 491 U.S. at 268 (citations omitted).

Most other circuits have held that the determination of materiality in criminal perjury and false statement statutes is a question of law for determination by the judge. The Ninth Circuit has held that the issue of materiality in most of these statutes is a question of law for the judge. The Ninth Circuit is at variance with other Circuits regarding section 1001 cases, holding that materiality it is an element of the crime that must be determined by the jury. United States v. Valdez, 594 F.2d 725, 728-29 (9th Cir. 1979).

The opinions holding that the issue of materiality in these criminal cases is a matter of law for the court to decide have relied on the 1929 Supreme Court case of Sinclair v. United States, 279 U.S. 263 (1929), which involved a congressional investigation into the Teapot Dome Scandal. The defendant was charged with a violation of 18 U.S.C. §192 for failing

to answer a question that was "pertinent to the question under inquiry." The Court held that the issue of pertinency was akin to determining relevance in the admission of evidence in a trial and therefore was a matter of law reserved for the court. Id. at 298 But the critical, and fundamental, essential and threshold issue remains: Whether the opinions relying on Sinclair survive the more recent holdings of the Supreme Court that the Sixth Amendment and the Due Process Clause require that the facts essential to establish the elements of a crime must be decided by a jury?

Moreover, as the government pointed out to the Third Circuit, Sinclair v. U.S., 279 U.S. 263, 298, 49 S.Ct. 268, 273, 763 L.Ed. 692, 700 (1929) is no more than dictum in Kungys v. U.S., 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed. 2d 839, 854 (1988), and furthermore does not squarely answer this question.

The Supreme Court of New Jersey cogently explained the inapplicability of Kungys and Sinclair, as did the Court of Appeals in Gaudin, supra.

. . .We note that the statute at issue there, [Kungys,] does not provide for a trial by jury, Luria v. United States, 231 U.S. 9, 27-28, 34 S.Ct. 10, 15, 58 L.Ed. 101, 107 (1913); consequently, the issue would be

resolved by the court no matter how characterized. Although the Court in Kungys requested additional briefs on whether materiality is a question of law or fact, its focus was on the proper scope of review. 485 U.S. at 772, 108 S.Ct. at 1547, 99 L.Ed.2d at 854. The Court saw 'no reason not to follow what has been done with the materiality requirement under other statutes.' ibid., primarily because there was no occasion to address either the constitutional jury-right issue or the related due-process issue. We are not convinced that should the Supreme Court squarely address the issue, it would find the rule of Sinclair reconcilable with its construction of the fundamental right to a trial by jury.

In Gaudin, the court recognized that Kungys involved the denaturalization of a citizen, in a civil, non-jury proceeding. The Kungys court, in the process of reviewing the materiality decision, stated that it must first decide whether the determination of the materiality of the false statement of the date and place of birth should be reviewed as a question of law or a question of fact. Kungys, 485 U.S. at 772. In effect, the Court was determining the appropriate standard of review of the district court's decision in this civil case. The Gaudin court found it inconceivable that the Supreme Court in Kungys intended to resolve the constitutional questions explicit in a criminal case (i.e. 5th and 6th Amendments, proof of every essential

element beyond a reasonable doubt by a jury, and due process) through Sullivan in a civil non-jury case without ever mentioning the Winship line of cases.

The Court's opinion in stating the test for determining materiality that the false statement be one that 'has a natural tendency to influence or was capable of influencing, the decision of the decisionmaking body,' noted that this involves a factual determination. The opinion states '[t]his test must be met, of course, by evidence that is clear, unequivocal, and convincing.' Kungys, 485 U.S. at 772 (emphasis added). The judge may be free to evaluate this evidence in order to make that determination in a civil case, but this is not true in a criminal case. In a criminal case, the test must be met by evidence that establishes materiality beyond a reasonable doubt. Justice Scalia also explains the reason for remanding certain of the alleged misrepresentations stating, 'it is not our normal practice to consider fact-bound legal consequences of contested district court findings not yet reviewed by the court of appeals.' Id. at 773 n. 6 (emphasis added). In a criminal case, Sullivan would require

that these findings of fact be made by a jury.

Both the tenets of due process and the right to a jury trial mandate that materiality, as an element of the offense of false statements to a grand jury, must be found beyond a reasonable doubt by the jury. The United States Supreme Court has held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute them with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 366, 375 (1970); accord Cage v. Louisiana, 498 U.S.___, ___, 111 S.Ct. 328, 329, 112 L.Ed. 2d 339, 341 (1990) (quoting Winship); Carella v. California, 491 U.S. 263, 265, 109 S.Ct. 2419, 2420, 105 L.Ed.2d 218, 221 (1989) ("The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense.") State v. Anderson, 127 N.J. at 200-01.

How could so many have been so wrong for so long? Explained in Anderson, the answer reveals:

(1) First, the early cases erroneously equated materiality for purposes of the perjury statute with

materiality as a preliminary determination on the admissibility of evidence.

(2) Second, the rule that characterized materiality in perjury cases as a question of law became well established as later opinions cited the early cases, apparently with little or no independent analysis. Thus, the allocation to the court of the determination of materiality became firmly entrenched in the law without having been subjected to detailed scrutiny or having been harmonized with the requirements of due process and the right to a jury trial. 127 N.J. 204-05.

(3) Finally, faced with the seemingly overwhelming precedent, most courts have declined to reexamine the validity and soundness of the rule in light of more recent cases emphasizing the right of an accused to have the jury find all elements of a crime beyond a reasonable doubt. [Id. at 1166 (citations and footnote omitted).] 127 N.J. 205-06.

The right to a jury trial is perhaps more fundamental than any other right. It reflects the conscience and responsibility of the community and embodies the common sense and feelings of society in general. A defendant ordinarily maintains the right to have the same trier of fact decide all issues of fact.

The dissent in Gaudin, notes Gaudin is in conflict with all other federal circuits, and further recognizes the importance of the decision because if materiality is a question of fact in 18 U.S.C. §1001 prosecutions, then it is a question of fact in other

prosecutions involving materiality.

In re Winship, and its progeny, the Fifth Amendment due process clause, the Sixth Amendment right to a jury trial and the fundamental precept in criminal cases that every essential element be proven beyond a reasonable doubt to the jury compels reversal in this case.

2. PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE VIOLATED WHERE THE GOVERNMENT FAILED TO PROVE THE ESSENTIAL ELEMENT, MATERIALITY, BEYOND A REASONABLE DOUBT.

Section 1623 of Title 18 proscribes "false material declarations" made before a grand jury, and, by its express terms, the statute is violated only when the perjury is committed in response to a question which bears upon the matters within the investigation's purview. The government must prove this nexus. It is clear in the Third Circuit that materiality is an element that must be proven beyond a reasonable doubt. in U.S. v. Slawik, 548 F.2d 75, 79 (3d. Cir. 1977) The government has clearly failed to prove this element.

"The test for determining materiality is whether

the allegedly perjurious statement tends to impede or hamper the course of the investigation by the grand jury." U.S. v. Bednar, 728 F.2d at 1047. The appropriate way to analyze materiality was set forth in two prongs in U.S. v. Brimberry, 779 F.2d 1339, 1349 (8th Cir. 1985):

> "The first matter to examine is the scope of the grand jury investigation." ..
>
> "The second matter to examine is how the false testimony may have impeded the grand jury's investigation."

As to this first prong, the government failed to prove the scope of the grand jury investigation before which Mr. Porat testified. Porat squarely raised this matter at the conclusion of the government's case.

At no time, however, did the government, at trial, prove the particular nature or scope of the grand jury before which Mr. Porat testified. Moreover, in fact, the government never proved that the grand jury in which Mr. Porat testified is the same grand jury alleged in the indictment.

As to the second prong, it is argued infra that it was not material to any grand jury investigation whether or not Mr. Porat had a bank account (Count

Two), (or received a check - Count One), particularly where the check was allegedly given as a commission in relation to an Israeli contract in the State of Israel; and the question regarding a bank account would be even less material.

Moreover, the governrnent's attempt to alter this fundamental requirement in requesting a pretrial determination of materiality was denied by the court. The Court stated, "I decline to do so until I've heard the government's evidence." This was an effort to undermine Petitioner's Fifth and Sixth Amendment rights, to due process, a fair jury trial, and confront and cross-examine his accusers. Having lost their motion, the government sought to rely on its pre-trial Motion for Determination of Materiality and Exhibits thereto, to support their argument to affirm the conviction in the Court of Appeals. The government not only wishes to deny Petitioner his right to a jury trial, supra, but seeks to deny him the opportunity to challenge, confront and cross-examine the government's evidence. This evisceration of fundamental rights is dangerous to the basic concept that all essential elements must be proven at trial, after the opportunity to confront and

cross-examine is provided. Nothing less will suffice.

The government has failed to prove that the grand jury before which Mr. Porat testified was the same grand jury conducting the investigation of bids submitted between 1983 and 1986 on certain military bandage contracts awarded by the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense (DPSC).

In virtually every false declaration prosecution the government proves this essential element by calling to testify at trial the grand jury foreperson, another grand juror, or the assistant U.S. attorney in charge of the investigation and grand jury. See, U.S. v. Pearce, 428 F. Supp. 1328, 1332 (E.D. Pa. 1977) (" the foreman of the grand jury, testified") (emphasis supplied); U.S. v. Brumley, 560 F.2d 1268 at 1278 (5th Cir. 1977) (" the United States Attorney in his testimony . . . .") (emphasis supplied); U.S. v. Doulin, 538 F.2d 466, 470 (2d Cir. 1976) (". . the testimony of one member of each of the grand juries involved,") (emphasis supplied); U.S. v. Goguen,723 F.2d 1012, 1019 (1st Cir. 1983) "the grand jury foreman testified as to materiality" (emphasis supplied); U.S. v.

Lasater,535 F.2d 1041, 1046 (8th Cir. 1976) (The case agent and the assistant U.S. attorney testified") (emphasis supplied)

In all cases, the relevant witness testified at trial and was subject to cross-examination. It was just this that the government sought to avoid. It was argued that there was great concern that such a person would admit that the information sought was not material to the purported matter under investigation. A review of the insufficiency of the second prong answers the questions posed as to the first prong.

The grand jury testimony was clear that the $200,000 check was a commission to Amir Porat in return for his supplying the price to bid in Israel for this Israeli contract. Offenhartz stated it represented a 40 cent commission for each of the 500,000 bandages ordered. In knowing what to bid, Offenhartz was able to make as much money as he could and be assured he would obtain the contract. The Israeli's still desired to get the best price they could. His initial offer was $2.19 but, after consultation, it later became $1.59. Moreover, this contract was of a sort on which Porat was unable to bid. As the Israeli government made

clear the contract had to go to an American company and the Israeli's perceived I.M. as the same as Pollack of Israel. This was not material to the grand jury and would not be sufficient to prove beyond a reasonable doubt the offenses charged.

If anything, this was an independent, one time attempt at providing a price and securing a contract. This was a unique, separate and distinct venture. In fact, this was not even a "bid." Offenhartz had not conducted business for years in the State of Israel, since the mid-70's.

This provided an opportunity to determine ahead of time the best price to offer, if one believes Offenhartz. This was unlike the purported U.S. bidrigging scheme where allegedly prices to bid were determined beforehand by the "competitors" and then the competitors each submitted "secret bids." Here there was no bidding as such, no other company was involved, but rather the contract was given to Fraass after Fraass through Offenhartz made an offer which was determined by the Israeli's to be acceptable. It was a negotiated contract between Fraass and the Israeli's. In fact he reduced his price 69 cents.

The district court relied upon three factors in determining that the scope of the grand jury was properly proven. Those three points were: (1) the grand jury transcript of Porat on May 7, 1989; (2) the testimony of Kimberly Pepper, the grand jury court reporter; and (3) the testimony of Colin Offenhartz. (District court did not review the second prong, that the check was in relationship to an Israeli contract.)

However, after an an examination of the May 17, 1989 transcript, Pepper's testimony and Offenhartz' testimony at trial reveal that the scope of the grand jury wherein Porat testified was never proven. Pepper testified that her transcription was accurate. She did not testify to the matters under investigation.

An individual cannot be convicted unless the Government demonstrates that the alleged perjurious statements were material to the proceeding at which they were made. See U.S. v. Crocket, 568 F.2d 1049 (3rd Cir. 1977); U.S. v. Slawik, 548 F.2d 75 (3rd Cir. 1977). The alleged payment was in relation to a non-bid contract made by Fraass in Israel, not the United States. The Government, again by the terms of its indictment, investigated reported collusive bidding on

U.S. military bandage contracts awarded by the Defense Personnel Support Center of the Defense Logistics Agency of the Department of Defense of the United States Government. Similarly, on the same basis, as to the second count, it would not be material whether or not Porat had a Swiss account.

It is not material to the grand jury to determine Amir Porat's relation to Fraass regarding whether he had a Swiss bank account, where the grand jury is purportedly investigating bid rigging on U.S. Military bandage contracts awarded by the U.S. Department of Defense between 1983-1986.

3. THE DISTRICT COURT ACTED WITHIN THE TIME HONORED INHERENT, HISTORICAL, AND STATUTORY BROAD DISCRETION IN SENTENCING PETITIONER TO SERVE THE HOME DETENTION PORTION OF HIS SENTENCE IN ISRAEL

In a case of first impression, this issue reaches the critically important question of the inherent, historical, and statutory broad discretionary authority of the district court to impose reasonable condition upon supervised release sentences. There appears as well to be a split between the Third Circuit and Tenth Circuit, the only two circuits that have reviewed the

issue.

Today, there are ever increasing numbers of foreign nationals that are convicted of crimes in the U.S. and at the same time a severe shortage of prison facilities and bed space. In addition, as the world gets smaller, U.S. citizens find themselves more often living and working in foreign countries.

The home confinement portion of the supervised release aspect of Porat's sentence as imposed by the district court was lawful; wholly within the discretion of the trial court to require Petitioner to serve it in Israel.

The "split sentence" provision of §5C1.1 states:

> If the applicable guideline range is in zone C of the sentencing table, the minimum term may be satisfied by --
>
> (1) a sentence of imprisonment; or
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one half of the minimum term is satisfied by imprisonment.

It is not unlike a split sentence under the old law of 18 U.S.C. 3651, where the Court was provided the flexibility in sentencing when there was only <u>one</u>

count of conviction to impose a period of incarceration followed by a period of probation.

In the government's attempt to label this aspect of the specified condition of supervised release of home confinement an unlawful sentence, it proceeds upon a misconception. The government argued, "There is no statute or rule authorizing such a sentence." To the contrary, there is no statute or rule that specifically prohibits the Court from imposing any number of conditions attached to supervised release and/or probation. Rather, there exists statutory and case law authority for exactly what the court did. Further the rule of lenity acts in Petitioner's favor.

There are two possible options: The first is a straight sentence of imprisonment §5C1.1b(1), and the second allows the court to split the sentence so that one portion of the sentence is fulfilled by imprisonment and the other portion by a term of supervised release with a condition that substitutes community confinement or home detention for the balance. The closing phrase, "...at least one half of the minimum term is satisfied by imprisonment" recognizes that, in fact, only one half must be imprisonment. It is clear from the

application notes that the aspect of the supervised release is not a term of imprisonment but rather is a substitute for imprisonment. The guidelines provide that home detention may be imposed as a condition of probation or supervised release. §5F1.2. The application notes recognize that the Court (1) may impose other conditions of probation or supervised release appropriate to effectuate home detention;and that it is not required that electronic monitoring be utilized in order to monitor the defendant in connection with home detention. §5F1.2, application note 1,2.

§5B1.3 of the sentencing guidelines describes the variety of possible conditions of probation. §5B1.4 identifies the recommended conditions of probation and supervised release which appear as a policy statement. 18 U.S.C. 3563 reviews the wide variety of conditions of probation that may be imposed by a court, both mandatory and discretionary. §18 U.S.C. 3583 recognizes these factors and conditions as varied as they may be for supervised release.

. . . .The court may order, as a further condition of supervised release, to the extent that such condition --

> (1) is reasonably elated to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C),

> and (a)(2)(D);
> (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
> (3)is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate.

The Third Circuit Court of Appeals essentially rewrote the statutory framework of supervised release, and did so because it perceived, without Porat's opportunity to make a factual record in the lower court, by stating that "we do not see" and "It is not clear" how probation department would maintain oversight and ensure compliance with the sentence. The statutory framework overlooked by the Third Circuit reveals, as the district court recognized by its sentence, that the district court does not have to require the defendant to remain within the jurisdiction of the court 18 U.S.C. 3563 (b)(15), report to a probation officer 18 U.S.C. 3563 (b)(16), require a probation officer to visit him 18 U.S.C. 3563 (b)(17), or in requiring the defendant to remain at this place of residence during non-working

hours to be electronically monitored 18 U.S.C. 3563 (b)(20).

There is authority for a district court to order an alien who has been sentenced to supervised release to be deported and remain outside of the United States. 18 U.S.C. §3583 (d). If a court can order an individual on supervised release to remain outside the United States, it necessarily follows that the Court can require that individual to abide by conditions of supervised release, including that of home confinement while outside of the United States.

18 U.S.C.§3586, makes clear that "the implementation of the sentence of imprisonment is governed by the provisions of Subchapter C of Chapter 229 [18 U.S.C. Section 3621 et seq.] and, if the sentence includes a term of supervised release, by the provisions of Subchapter A of Chapter 229 [18 U.S.C. Section 3601 et seq.].

Section 18 U.S.C. 3601, Supervision of probation states:

A person who has been sentenced to probation pursuant to the provisions of Subchapter B of Chapter 227 [18 U.S.C. 3561 et seq], or placed on probation pursuant to the provisions of Chapter 403 [18 U.S.C. Section 5031 et seq], or placed on supervised release pursuant to the provisions of Section 3583 [18 U.S.C.

Section 3583], shall, during the term imposed, be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court. (emphasis supplied)

Conditions of supervised release, as ordered by the district court, are reviewed for abuse of discretion.[4] See U.S. v. Pugliese, 960 F.2d, 913, 914 (10th Cir. 1992). The Third Circuit overstepped its appellate function, since the sentence was lawful and the district court did not abuse its discretion. The court of appeals in Pugliese recognized that Pugliese had in the district court "attached to his reply brief a copy of a purported order of another court allowing a person on supervised release to live abroad" (960 F. 2d at 915), and while denying relief to Pugliese, the court still recognized, "We see in the law, however, no direct impediment to authorizing a person on supervised release to leave

[4] "This standard of review is echoed in cases concerning conditions of probation, both in statutes and in the sentencing guidelines, provisions for conditions of supervised release are cross-referenced with provisions for conditions of probation. See 18 U.S.C. §3563(b) (probation)), U.S.S.G. §5D1.3 (supervised release) (referring to U.S.S.G. §5B1.4, p.s. (probation)). Thus, cases interpreting issues concerning conditions of probation provide standards for issues related to conditions of supervised release. U.S. v. Jalilian, 896 F.2d 447, 448 (10th Cir. 1990) (legality of discretion); and United States v. Hussong, 778 F.1d 567, 589-70 (10th Cir. 1985) ('a sentencing judge has broad discretion to impose conditions of probation reasonably related to protecting the public and rehabilitating the defendant')". U.S. v. Pugliese, 960 F.2d 913, 915 f.n.3.

the United States, if the supervision the judge believed is necessary can be enforced abroad." Id. at 915.

The Court in Pugliese wrote:

District courts have wide latitude to determine the extent of geographic restrictions as conditions of supervised release. See 18 U.S.C. §3563(b)(14) ('The court may provide, as further conditions of a sentence of probation. . . that the defendant reside in a specified place or area, or refrain from residing in a specified place or area.'); 18 U.S.C. §3563(d) (including the provision of §3563(b)(14), among others, as a discretionary condition of supervised release); U.S.S.G. §5B1.4(a)(1), p.s. ('defendant shall not leave the judicial district **or other specified geographic area without the permission of the court or probation officer;'** implying that permission for other geographic assignments is possible if appropriate for the defendant's individual circumstance) (emphasis in the original). 960 F. 2d at 915

It is clear that a district court:

may impose other conditions of supervised release to the extent that such conditions are reasonably related to (1) the nature and circumstances of the offense and the history and character reference of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational vocational training, medical care of the correctional treatment in the most effective manner. See 18 U.S.C. 3553(A)(2) and 3583(D).

As such, the district court was wholly within its

discretion in permitting Mr. Porat to serve the supervised release portion of his sentence in home confinement in Israel. The government has not met its burden of proving abuse of discretion. See U.S. v. Polchlopek, 897 F.2d 997, 998 (9th Cir. 1990) (Courts have broad discretion in setting conditions of probation).

The government is either aware or should be aware that the Probation Department for the Eastern District of Pennsylvania made arrangements with an American company to electronically monitor the home detention of Porat in Israel. Furthermore, the government is certainly aware that Mr. Porat has fully and completely complied with all terms and conditions in his reporting while on bail.

In addition, while certainly unnecessary, the trial court could require, and Porat would not object, to the continuation of his bail and/or any other appropriate order that would keep in place his substantial bail until his sentence, including that portion of home confinement, was fulfilled. Should a violation occur it would result in the forfeiture of the substantial bail and posted property. As well, in

connection with Mr. Porat's bail, he filed pleadings in which he waived any right to contest extradition either in Israel or anywhere else in the world. Further, the district court is capable of determining all of the appropriate conditions of home confinement, including when, how, and where it would be served.

As with any split sentence, for any person, regardless of nationality or residence, the Bureau of Prisons is empowered to determine the place of designation for that portion of the sentence that includes imprisonment. Thereafter, the Bureau of Prisons will play no function with respect to the aspect of supervised release. The statute cited by the government, 18 U.S.C. 3621, recognizes that a person who has been sentenced to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." After the first 5 months imprisonment, the Bureau of Prisons no longer maintains custody over the individual.

As the home detention portion of a split sentence is not a sentence of incarceration for an American, it cannot be one for a foreign national.

4. PETITIONER WAS DENIED A FAIR TRIAL WHEN IRRELEVANT OVERLY PREJUDICIAL AND UNRELIABLE HEARSAY "OTHER CRIMES" EVIDENCE IN THE NATURE OF ANTITRUST VIOLATIONS WAS ADMITTED AND WHERE PETITIONER WAS DENIED THE OPPORTUNITY TO PROVE HIS GOOD CHARACTER IN VIOLATION OF MICHELSON V. UNITED STATES.

Petitioner contends that the District Court erred when it admitted evidence of alleged antitrust violations, since such prior acts were too remote in time, inconclusive, confusing, prejudicial, unreliable, based on unsubstantiated hearsay statements, unfairly impugned the character of Petitioner, and unfairly altered the focus of the trial from the crime charged.[5]

The "other crimes evidence" came in two regards. One, the government sought to prove a purported "worldwide conspiracy to violate antitrust laws" where the parties, Offenhartz and Petitioner, allegedly agreed not to bid in eithers native market. Essentially, Offenhartz, an American was not to bid in Israel, and, Porat, an Israeli, was not to bid in the United States. However, this "evidence" was premised

[5] The government offered U.S. v. Williford, 764 F.2d 1493 (11th Cir. 1985).Petitioner offered U.S. v. Roenigk, 810 F.2d 809 (8th Cir. 1987), a case, as here, where the defendant was charged with violation of 18 U.S.C. §1623.

upon an admitted perjurer, Colin Offenhartz, where Offenhartz had repudiated any such "agreement" before it started. The "agreement" allegedly was not proximate in time, but in 1977-1979. Each of the respective parties had their own important reasons for not venturing into the other's native market. Offenhartz had historic problems with the Israelis. In addition, he was involved on defense contracts with the U.S. government where most of the world market existed. Offenhartz, by his own admission, had 90% of the world market which was based in the United States. At the time of this alleged agreement, Porat's company, I.M. did not exist. Pollack, an Israeli company then existed, of which Porat was a principal but was legally unable to bid in the United States due to the Barry Amendment and the Buy American Act.

The second grouping of other crimes evidence, was with regard to U.S. bids. However, this "other crimes" evidence was, completely unreliable. Per Offenhartz, all conversations regarding the U.S. bidrigging for prices was between Porat and

Offenhartz' deceased partner, Siragusa.[6] These alleged discussions should not have been admitted into evidence because it was not shown that Siragusa was a co-conspirator, the only evidence of a relationship between I.M. and Fraass comes from the mouth of Colin Offenhartz, and therefore anything said by Siragusa is hearsay.

The only evidence of the "discussions" is the unadorned statement of Colin Offenhartz: such evidence is not enough to permit a conclusion by a preponderance of the evidence that the discussions took place, that they were coconspirators,` and not enough to permit the introduction of the evidence.

This presents the question left open in Boujaily that:

> We need not decide in this case whether the courts below could have relied solely upon Lonardo's hearsay statements to determine that a conspiracy had been established by a preponderance of the evidence. Boujaily v. U.S., 483 U.S. 171, at 181. (emphasis

[6] The government strenuously argued this other crimes evidence in closing that Petitioner committed antitrust violations involving "six different camouflage bandage contracts. And for each and every one of those contracts, ladies and gentlemen, Tony Siragusa, provided the defendant with the price to bid or the price to bid above and on each and every one of those contract, ladies and gentlemen, the defendant did just as he was asked. He lived up to his part of the deal and submitted high bids on behalf of Fraass."

supplied)

Fundamentally, [t]here must be evidence that there was a conspiracy involving the declarant and the non-offering party, and that the statement was made "during the course and in furtherance of the conspiracy." Bourjaily v. U.S., 483 U.S. at 175.

While the government was painting the Petitioner a "bad person", the district court denied Petitioner the opportunity to present evidence of his good character in violation of Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed 168 (1948). Character evidence is so important, it can, in its own right, create reasonable doubt. Michelson v. United States, supra., U.S. v. Logan, 717 F.2d 84 (3rd. Cir. 1983). Petitioner was prepared to lay the proper foundation, but the court denied the admission because the character witness despite speaking to those in the community that knew Porat in English, did not speak Hebrew himself.[7]

Notwithstanding Huddleston v. United States,

[7] Petitioner was prepared to prove the character witness knew Petitioner, knew others that knew Petitioner, and had occasion to discuss his reputation for honesty, truthfulness, and for being a law abiding person with those other individuals and report that he held such good reputation.

485 U.S. 681, 108 S.Ct. 1496, (1988), there remains significant inter and intra circuit confusion on substantive issues which dramatically affect the use of "other crimes" evidence. Guidance provided by Huddleston, supra, recognized, that the other acts evidence must 1) have a proper purpose, (2) be relevant, (3) be more probative than prejudicial, and (4) be later accompanied with a limiting instruction.

There remains a split by the different Circuits' interpretation and standard for admission of "other crimes evidence"; further, once admitted, there is a split amongst the Circuits concerning the standard of review of the district courts' decision ("clear abuse of discretion"; "substantial error", and yet others apply a de novo standard of review") and last, the Third Circuit, unlike others, recently requires the district court to articulate its' reasoning for the admission.

For example, distinguished from the First, United States v. Carty, 993 F. 2d 1005, 1011 (1st 1993); Second, United States v. Gordon, 987 F.2d 902, 908 (2nd Cir. 1993); and Fifth Circuits', United States v. Ridlehuber, 11 Fed. 3rd 516, 522 (5th Cir. 1993), two-step review and the Third Circuit's, United States

v. Sampson, 980 F.2d 883, 886 (3rd Cir. 1992) four-step review, the Fourth Circuit applies a three-part test to implement Rule 404(b) which allows admission if the evidence is "1) relevant to an issue other than character, 2) necessary and 3) reliable. United States v. Sparks, 1994 WL 177450 (4th Cir. 1994). Then proceeds to the balancing test. Unites States v. McMillon, 14 F. 3rd 948 (4th Cir. 1994).

The Seventh Circuit, as well, is concerned that the evidence shows the other act is similar enough and close enough in time and that the evidence is sufficient to support a jury finding of the other act. United States v. Flores, 5 Fed. 3rd 1070, 1080 (7th Cir. 1993). The NInth Circuit similarly is concerned that the other act is similar, not too remote in time and that the evidence is sufficient to support a finding that the other act was committed. United States v. Bradley, 5 Fed. 3rd 1317, 1320 (9th Cir. 1993).

The Third and Ninth Circuits distinguish themselves by requiring a requisite logical connection. The NInth Circuit requires, the government to "articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the

other acts evidence." United States v. Mayans, No. 92-50530, Slip Op. 1603, 1616 (9th Cir. Feb. 9, 1994) quoting United States v. Mehremanesh, 689 F.2d 822, 830 (9th Cir. 1982). The Third Circuit requires the court to "articulate reasons why the evidence also goes to something other than character". United States v. Sampson, supra; Gov't of the Virgin Islands v. Archibald, 987 F.2d 180 (3rd. Cir. 1993).

Most Circuits review for abuse of discretion, it appears the Sixth Circuit first reviews whether the prior acts occurred pursuant to clear error, United States v. Gessa, 971 F.2d 1257, 1261-62 (6th Cir. 1992), determine de novo if the prior acts are admissible under 404(b), and then abuse of discretion concerning the balancing test. United States v. Wright, 16 F. 3rd 1429 (6th Cir. 1994).

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
THEODORE SIMON
Counsel for Petitioner

(2)

Supreme Court, U.S.
FILED

94 140 JUL 12 1994

No. OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1994

AMIR PORAT,

Petitioner

v.

UNITED STATES OF AMERICA

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Theodore Simon
2400 Architects Bldg.
117 S. 17th Street
Philadelphia, PA 19103
(215) 563-5550

Counsel for Petitioner Porat

58 pp

TABLE OF CONTENTS

Page

Appendix A

Opinion, Third Circuit Court of Appeals A1-22

Order, Third Ciruit Court of Appeals denying Petition for Rehearing A23-24

Memorandum and Order U.S. District Court A25-54

U.S. District Court Judgment and Comittment Order A55-56

A

Filed March 3, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1095; 93-1176; 93-1242; 93-1243

UNITED STATES OF AMERICA

v.

AMIR PORAT,

Appellant in 93-1095 and
93-1242

UNITED STATES OF AMERICA

Appellant in 93-1176 and
93-1243

v.

AMIR PORAT

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Criminal Action Nos. 92-00096; 92-00096-01)

Argued: December 14, 1993

Before: SLOVITER, *Chief Judge*, GREENBERG
and ROTH, *Circuit Judges*

(Opinion Filed March 3, 1994)

Anne K. Bingaman
Assistant Attorney General
John J. Powers, III, Esquire
Andrea Limmer, Esquire (Argued)
United States Department of Justice
Tenth & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Antonia R. Hill, Esquire
Willard S. Smith, Esquire
United States Department of Justice
Antitrust Division
Curtis Center, Suite 650
One Independence Square West
Philadelphia, PA 19106
Attorneys for United States of America

Theodore Simon, Esquire (Argued)
117 South 17th Street
Architects Building, Suite 2400
Philadelphia, PA 19103
Attorney for Porat

OPINION OF THE COURT

ROTH, *Circuit Judge*:

On March 3, 1992, a grand jury sitting in the Eastern District of Pennsylvania indicted Amir Porat on two counts of making material false declarations before a 1989 grand jury investigating antitrust violations between Porat's company, IM, Inc. (IM), and Fraass Survival Systems, Inc. (Fraass).

Count One charged that Porat made a false statement when he denied receiving a $200,000 check issued by Fraass to Credit Suisse, a bank located in Switzerland. Count Two charged that Porat made a false statement when he denied ever having a personal bank account in Switzerland.

Following a one week trial in December 1992, a jury convicted Porat on Count Two but was unable to reach a

verdict on Count One. The district court declared a mistrial as to the first count and imposed a sentence on Count Two of five months' imprisonment followed by five months' supervised release, conditioned on home detention in Israel, and a $10,000 fine. Porat filed an appeal to this Court raising a number of issues relating to his trial. The government cross-appealed, objecting to the terms of Porat's sentence.

After reviewing the record, we uphold Porat's conviction.[1]

---

1. In his brief and in oral argument Porat raised a number of issues on appeal. We have reviewed each, and do not find Porat's arguments persuasive. The following is a list of the assertions raised by Porat:

(1) Whether the government failed to prove the "materiality" element of 18 U.S.C. § 1623 by failure to prove either the scope of the grand jury investigation or how the testimony may have impeded the grand jury's investigation.

(2) Whether the evidence was insufficient pursuant to *Bronston v. United States*, 409 U.S. 352 (1973), where the answers were literally true but unresponsive.

(3) Whether, in order to comply with due process, the element of "materiality" must be submitted to the jury for proof beyond a reasonable doubt.

(4) Whether the defendant was denied a fair trial when he was precluded from presenting important material and relevant evidence at trial, including: testimony from his case investigator; evidence of his good character; effective cross-examination of the government's chief accuser; and the opportunity to refute improper other crimes evidence.

(5) Whether the defendant was denied a fair trial when irrelevant, overly prejudicial and inadmissible evidence in the nature of antitrust violations was admitted and further where such evidence was based on other inadmissible and unreliable hearsay evidence.

(6) Whether the admission of prior inconsistent evidence was reversible error.

(7) Whether the government improperly "vouched" for witnesses.

(8) Whether the defendant's right to close to the jury was violated and was he unfairly impugned before the jury.

(9) Whether the government committed reversible error in its closing statement to the jury.

On cross-appeal, the government asserts that the district court erred in failing to adjust Porat's base offense level upward by two levels pursuant to Sentencing Guidelines § 3C1.1 for obstruction of justice. Second, the government asserts that the district court lacked authority to permit Porat to serve five months of his sentence in home detention in Israel. We disagree with the government's first contention. We agree, however, with the government's second contention and will therefore vacate the home detention portion of the district court's judgment of sentence and remand for resentencing.

I.

Amir Porat is an Israeli national who moved to New Jersey in the early 1980s to establish IM, a medical supply company.[2] Prior to this time, Amir and his brother, Michael Porat, owned and operated H.G. Pollack, Ltd. (Pollack), which manufactured medical supplies in Israel. Amir Porat continued to have an interest in Pollack after his move to

---

(10) Whether the government failed to disclose false testimony or substantially misleading testimony of their chief witness.

(11) Whether the government violated the defendant's rights including his due process rights by the impermissible use of the United States and Switzerland Mutual Legal Assistance Treaty in combination with a "perjury trap."

(12) Whether there was unconstitutional preaccusation delay.

(13) Whether the district court should have recognized that it had the authority, when presented with facts and circumstances not considered by the Sentencing Commission, to sentence below the guidelines.

In consideration of these issues on appeal, we have reviewed the defendant's brief, the trial transcript, the sentencing transcript, and all additional information filed with this Court. After a thorough review, we do not believe that the district court committed any evidentiary, constitutional, or other error that would provide for the relief that the defendant claims.

2. Since the mid-1980s, Porat has maintained his primary residence in Israel, although he continues to own a home in New Jersey. Porat voluntarily returned to the United States to stand trial.

this country. At the time of IM's entry into the American market in the early 1980s, only a few companies bid on Department of Defense (DoD) contracts to supply certain types of military bandages. The major supplier was Fraass, headquartered in New York and owned and operated by Colin Offenhartz.

At trial, the government proved that Porat made a false material statement to the 1989 grand jury, in part by showing as background to the false statement that Offenhartz and Porat had allegedly conspired to rig bids on DoD contracts. Although Porat was a target of the 1989 grand jury investigation into alleged bid-rigging, no indictment was ever brought against him on antitrust violations.[3]

As background evidence in support of its case, the government showed that Porat and Offenhartz agreed that Fraass would bid high on military contracts in which Pollack had established a market presence (Israel and other foreign markets), and Pollack would reciprocate by bidding high on federal government contracts or not bidding at all. According to government witnesses, this alleged agreement continued after IM entered the United States market for military bandage contracts awarded by DoD.

In 1984, the Israeli government contacted Fraass and solicited a bid for military bandages. The funds to pay for this contract were loans from the federal government to Israel. Israel, in turn, was required to use an American manufacturer. Deeming IM to be fundamentally connected to Pollack, the Israeli government would not accept IM's participation in the contract. Fraass agreed to supply Israel with 500,000 bandages but at a price that exceeded the bids submitted to the DoD. According to Offenhartz's testimony, he contacted Porat, and they agreed that Porat

---

3. Offenhartz and Fraass Survival Systems, Inc. were convicted of bid-rigging in 1988. Offenhartz was sentenced to five years in prison and Offenhartz and Fraass received a combined fine of $1,000,000. After sentencing, Offenhartz and Fraass pled guilty to an additional charge of bid-rigging. Along with a further fine and forfeiture, one condition of that agreement was that Offenhartz cooperate with the government in other investigations.

would receive 40 cents on each bandage, or $200,000. Offenhartz testified that he made this payment to maintain the goodwill between the two companies, so that IM would continue to bid high on DoD contracts. Offenhartz testified to the 1989 grand jury and at Porat's trial that he gave Porat the check for $200,000 in person, after Porat asked that the check be made out to a Swiss bank account.

Porat voluntarily testified before the 1989 grand jury after being notified that he was a target of the investigation. He denied all knowledge of the check and denied that he maintained a Swiss bank account, into which the alleged check was deposited. The grand jury continued its investigation beyond Porat's appearance but did not bring an indictment against him for antitrust violations.

In March 1992, a second grand jury brought a two-count indictment stemming from Porat's testimony to the 1989 grand jury. Count One charged that Porat made a material false statement when he denied receiving a $200,000 check issued by Fraass to Credit Suisse, a Swiss bank. Count Two charged that Porat made a material false statement when he denied ever having a personal Swiss bank account.

At trial, the government sought to prove the material false statements with evidence that Porat had opened three bank accounts in Switzerland. The government submitted evidence of Swiss bank records which indicated that Porat traveled to Switzerland to open bank accounts on three occasions.[4] The bank records contain two identification numbers from Porat's passport along with Porat's signature. Among the evidence offered by the government was a copy of Porat's passport, which was provided to the government by Porat's counsel, and testimony of a handwriting expert who had analyzed Porat's writing. The

---

4. The government presented evidence that bank accounts were opened by Porat at Credit Suisse on: (1) October 8, 1984; (2) May 13, 1987; and (3) April 6, 1989. The evidence demonstrated that the first two accounts were opened using Porat's 1984 passport, while the third account was opened using a passport issued to Porat in 1988. The first account was closed on the same day that the second account was opened. The latter two accounts were closed in May, 1990.

handwriting expert testified that the signatures on the Swiss bank records were Porat's. This testimony was based on the Credit Suisse bank documents, court records and affidavits containing Porat's signature, a United States customs declaration and fingerprint cards signed by Porat, and exemplars provided by Porat in a session with an agent of the Defense Criminal Investigative Service.

Porat, acting pro se, did not testify, but he did present a substantially different version of events. Porat presented evidence that IM and Fraass were fierce competitors and that Offenhartz had paid Porat's brother, Michael Porat, the $200,000 for Michael's help in Fraass' contract with Israel. Porat's defense centered on the theory that Michael Porat established the Swiss bank account under Amir Porat's name. Porat presented evidence that he frequently signed financial documents for Pollack in Israel without reading them; thus Michael Porat was able to open a Swiss bank account without Amir Porat's knowledge. Finally, Porat presented testimony that Offenhartz disliked him, thus establishing a motive for Offenhartz's alleged untruths, and that Porat and his brother had had a falling out since the late 1980's, stemming from the circumstances surrounding the Swiss bank account.

The jury found Porat guilty of making a material false statement on Count Two. On January 19, 1993, following his conviction, the district court sentenced Porat under the Sentencing Guidelines. The district court determined that under the Guidelines, Porat's conviction amounted to a total offense level of 12. Having no prior criminal record, this placed Porat in the Guidelines imprisonment range of 10 to 16 months. The district court sentenced Porat to 5 months' imprisonment, 5 months' home detention, and a $10,000 fine. The district court ordered that Porat surrender for service of sentence by March 1, 1993. On February 2, 1993, the court held a hearing and permitted Porat to remain free on bond, pending final disposition of his appeal to this Court, with travel restricted to the United States and Israel.

II.

The district court had jurisdiction in this criminal matter pursuant to 18 U.S.C. §§ 1623 and 3231. We have appellate

jurisdiction over this appeal from the final decision of the district court pursuant to 28 U.S.C. § 1291 and over the government's cross-appeal from the sentence pursuant to 18 U.S.C. § 3742(b).

A district court's legal interpretation of the Sentencing Guidelines is reviewable de novo, but the court's factual determinations in applying the guidelines are reviewable for clear error. *United States v. Hickman*, 991 F.2d 1110, 1112 n.3 (3d Cir. 1993).

III.

We will first address the government's argument that the district court erred in refusing to increase Porat's base offense for obstruction of justice pursuant to Sentencing Guidelines § 3C1.1. Section 3C1.1 provides that:

> If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by 2 levels.

United States Sentencing Commission, *Guidelines Manual*, § 3C1.1 (Nov. 1992).[5] The Sentencing Guidelines do not require that the court find that the defendant succeeded in obstructing justice in order to receive an enhancement. Rather, a finding by the court that the defendant willfully "attempted to obstruct or impede" the administration of justice is sufficient grounds for an enhancement. U.S.S.G. § 3C1.1.

---

5. For purposes of our review, we have used the November 1992 Guidelines Manual, which embodies the Guidelines in effect at the time of Porat's sentencing on January 19, 1993. U.S.S.G. § 1B1.11(a) ("The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced."). The district court relied on these same Guidelines, except to the extent that the Guidelines in effect at the time of the offense were more favorable to the defendant. U.S.S.G § 1B1.11(b) ("If the court determines that use of the Guidelines Manual in effect on the date the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines in effect on the date that the offense of conviction was committed.").

A.

The government asserts that the district court erred when it failed to enhance Porat's sentence despite evidence that Porat attempted to disguise his handwriting in exemplars provided to the government. In order to prove its case that Porat made a false material statement concerning the ownership of a Swiss bank account, the government introduced evidence that the signatures on Credit Suisse documents to open bank accounts in Switzerland were Porat's signatures. The government presented a handwriting expert who testified that the signatures on the Credit Suisse documents were Porat's. The handwriting expert also testified that Porat attempted to disguise his handwriting during a session in which the government sought handwriting exemplars from him.

Porat's handwriting exemplars were provided to the government's expert, along with the bank records and other documents containing Porat's signature. The handwriting expert testified that Porat provided exemplars in which he failed to join the letters of his last name. This was in contrast to signatures that Porat had made in the normal course of business which the government expert had studied. Based on his analysis, the expert testified that Porat had "intentionally disguised" certain exemplars provided to the government. Joint Appendix (JA) at 639.

During sentencing, the district court specifically addressed the government's contention that Porat's offense level should be enhanced. The court provided two reasons for its refusal to enhance. First, the court noted that there was no actual obstruction because the handwriting expert was permitted to examine original documents containing Porat's signature along with the exemplars and, second, that Porat admitted his signature at trial.

An application note accompanying § 3C1.1 provides a non-exhaustive list of examples of the types of conduct to which this enhancement applies. Included among these examples is "conduct prohibited by 18 U.S.C. §§ 1501-1516." U.S.S.G. § 3C1.1, comment. (n.3(i)). The government asserts that Porat's attempt to disguise his signature falls within this category. Sections 1512(b)(1)[6]

---

6. 18 U.S.C. § 1512(b)(1) provides:

Whoever knowingly uses intimidation or physical force, threatens, or

and 1515(a)(3)(D)[7] of Title 18 provide that the knowing submission of a sample that is misleading in a material respect for the purpose of influencing an individual's testimony is unlawful. This would apply to handwriting exemplars supplied by a defendant with the intent to mislead an expert who was comparing such samples with the known signature of the defendant. *See United States v. Ashers*, 968 F.2d 411, 413 (4th Cir.), *cert. denied*, 113 S. Ct. 673 (1992) (falsified voice exemplar warrants two level enhancement under § 3C1.1).

In *Ashers*, however, the court of appeals was reviewing the district court's determination that a two level enhancement for obstruction of justice was justified, whereas in this case the district court chose not to apply an enhancement. It is clear that, once a court finds that the defendant willfully obstructed or attempted to obstruct, an enhancement is required. *See United States v. Dunnigan*, 113 S. Ct. 1111, 1119 (1993) ("Upon a proper determination that the accused has committed perjury at trial, an enhancement of sentence is required by [§ 3C1.1 of] the Sentencing Guidelines."); *United States v. Roberson*, 872 F.2d 597, 609 (5th Cir.), *cert. denied*, 493 U.S. 861 (1989) ("Section 3C1.1 is a directive to the court, instructing it to increase the offense level if it makes specific findings. Hence, if the court finds that the defendant obstructed justice, it must make the upward adjustment."). The difference here, as noted, is that the district court made a factual finding that the defendant did not obstruct or attempt to obstruct justice.

---

corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to influence, delay, or prevent the testimony of any person in an official proceeding . . . shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

7. 18 U.S.C. § 1515(a)(3)(D) provides:

> As used in sections 1512 and 1513 of this title and in this section the term "misleading conduct" means with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect.

During the sentencing hearing, the district court specifically stated that one of the reasons it decided not to enhance Porat's sentence was because "there's no causal effect" between the handwriting exemplars provided by Porat and an actual obstruction of justice. JA at 1610. This conclusion, however, amounts only to a finding that Porat did not *actually* impede the administration of justice. If this alone constituted the district court's ruling, we would be compelled as a matter of law to find that the court erred in failing to enhance Porat's sentence. The Sentencing Guidelines expressly require that a defendant's offense level be enhanced not only for actual obstruction but for attempting to obstruct or impede. *See* U.S.S.G. § 3C1.1 ("If the defendant willfully obstructed or impeded, or *attempted* to obstruct or impede, the administration of justice . . .") (emphasis added). A finding of no actual obstruction does not equal a finding of no attempt to obstruct. The Sentencing Guidelines are clear in that they are intended to punish not only successful efforts at obstruction, but also unsuccessful ones.

The district court stated its second reason for not enhancing Porat's offense level under Sentencing Guidelines § 3C1.1 was due to the fact that "[a]lthough [Porat] may not have admitted his signatures pretrial, at trial he admitted them." JA at 1611.[8]

During the trial, Porat presented a defense to the government's assertion that his signature appeared on the Credit Suisse bank records. Yael Azoulay, an employee of Pollack, testified that, when Porat conducted business in Israel for Pollack, he would sign many financial documents, often without taking the time to review them. This testimony buttressed Porat's assertion that his brother in Israel opened the Swiss bank accounts in Porat's name

---

8. The Government also asserts that Porat's pre-trial actions in attempting to disguise his handwriting merit an enhancement for obstruction of justice. The district court, however, listened carefully to Porat's explanations of the reasons for his signature appearing as it did in the exemplars. The district court found the evidence of obstruction to be "insubstantial." JA at 1612. Since the district court had the opportunity to weigh the credibility of the testimony, we cannot say that this determination was clearly erroneous.

without Porat's knowledge. In this respect, Porat presented evidence at trial that the signatures on the bank records were his own.

Given this testimony, the court presented Porat with the opportunity to admit that all of the signatures bearing his name on the Swiss bank account records were his.[9] Although such a stipulation would have been consistent with Porat's defense, he declined the court's invitation, expressing concern that such an admission might incriminate him in proceedings against him in Israel.[10]

The ultimate consequence of Porat's purported attempt to disguise his handwriting would be to refute the government's assertion that the signatures on the Credit Suisse documents were his own. Despite the mixed record, there is evidence in it to support the district court's finding that Porat admitted his signature. Only if we find clear error in the district court's findings would we be in a position to reverse the court's decision that Porat's offense level should not be enhanced. Having reviewed the record, we cannot say it was clear error for the district court to find that Porat admitted his signature at trial. Consequently, we will affirm the court's decision that Porat did not willfully attempt to obstruct justice by providing disguised handwriting exemplars.

B.

The government next asserts that Porat's sentence should be enhanced for obstruction of justice based on the copy of the passport that Porat submitted into evidence. During the

---

9. Such a finding would have permitted the court to instruct the jury that they need not consider the testimony of the government's handwriting expert, whose purpose it was to demonstrate that the signatures on the Swiss bank documents were Porat's.

10. A defendant is not obligated to admit to portions of the government's proof. The discussion between Porat and the court took place as the parties reviewed the draft jury instructions concerning the testimony of the handwriting expert. Porat challenged language in the jury instructions that he denied that it was his signatures on the bank records. The court agreed to strike the language which stated that Porat denied that the signatures were his.

trial, the jury was presented with two copies of Porat's 1984 passport, one submitted by Porat and the other submitted by the government.[11] These copies of the passport were identical except for one distinguishing feature — the copy entered into evidence by the government contained three identification numbers while the copy submitted by Porat contained only two identification numbers. This distinction was critical, because the Credit Suisse bank documents bearing Porat's signature contained the third identification number which was present only on the government's copy of the passport.[12]

The government's copy of Porat's passport had been provided by Porat's attorney.[13] The passport identification number appeared on its cover and in perforated form at the top of each page. In addition, the passport contained an Israeli identification number. On the government copy, a third number appeared in handwriting at the upper left

---

11. Neither party introduced Porat's original 1984 passport into evidence. Prior to the trial, the government subpoenaed Porat for the passport. However, the government was only able to obtain a copy of it through Porat's attorney. In addition to its assertion that Porat submitted an altered copy of his passport into evidence at trial, the government asserts that Porat's failure to provide the original passport as required by the subpoena represents further grounds to enhance his sentence for obstruction. During the sentencing hearing, Porat stated that the Israeli government has possession of the passport. Despite the government's assertion that this was the first time it was made aware of the Israeli government's possession of the passport, the district court found that Porat had previously informed the government of this fact through his written submissions. The government has failed to point this Court to anything in the record which refutes this finding. Consequently, we hold that the court's finding was not clear error and thus reject the government's assertion that Porat's sentence should be enhanced on the ground that he failed to comply with the subpoena.

12. In general, a passport is used by Credit Suisse to serve as identification for foreign individuals desiring to open a bank account.

13. On June 26, 1989, Porat's attorney at the time, Ned Rosenberg, sent a copy of Porat's 1984 passport to the government. At trial, this copy was entered into evidence by the government without objection. Rosenberg, who did not represent Porat at trial, testified that the copy of the passport he provided to the government had been sent to him by Pollack from Israel.

hand side of page 3. This number had been written in by the Israeli Consulate in New York. The passport identification number and the Israeli Consulate number matched the identification numbers from the passport used to open the bank accounts in Switzerland. This match provided critical evidence in the government's efforts to prove that Porat himself had opened the Swiss bank accounts.

During the trial, Porat entered into evidence a copy of his passport which did *not* include the Israeli Consulate number. The defense relied on the absence of this third, handwritten number to assert that Porat's passport was not the passport used to open the accounts in Switzerland, and, thus, Porat had not opened the accounts.

An application note, accompanying the Guideline for obstructing or impeding the administration of justice, includes among its non-exhaustive list of examples: "producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding." U.S.S.G. § 3C1.1, comment. (n.3(c)). The government asserts that Porat's offense level should be enhanced because Porat willfully intended to mislead the jury by the use of the copy of his passport which did not contain the third identification number.

An essential element under Guidelines § 3C1.1 is that the defendant act "willfully" in obstructing or impeding, or attempting to obstruct or impede, the administration of justice. U.S.S.G. § 3C1.1. In *United States v. Belletiere*, 971 F.2d 961 (3rd Cir. 1992), we held that "[b]ecause the government is the party seeking to upwardly adjust [the defendant's] sentence, the government bears the burden of proving by a preponderance of the evidence that the defendant *willfully* obstructed or impeded, or *willfully* attempted to obstruct or impede, the administration of justice." 971 F.2d at 965 (citation omitted).

At the sentencing hearing, the government submitted a letter from the Israeli government which stated that "[a]fter having examined the records of 1984, the numbers appearing on the upper left hand side of the passport are

indeed correct and were written in by the consul in New York." JA at 1847. At sentencing, the government argued that this letter provided evidence that the copy it had submitted at trial was a true copy, and the copy which Porat submitted was an altered version.

In response to the government's argument that Porat had utilized an altered passport, the district court stated: "you're absolutely right about what happened at trial." JA at 1617. Despite this finding, the court proceeded to hold that:

> I don't find the evidence that he *willfully* did this in the circumstances sufficiently persuasive. We have found throughout this because of the foreign governments involved . . . there is a problem with the evidence. It's not of the quality that we generally get. The witnesses are not subject to cross-examination and I find the letter from the Israeli Embassy, without questioning its accuracy, not sufficient to convince me that Mr. Porat has *willfully* . . . altered the document and *willfully* submitted a forged document.

JA at 1617-18 (emphasis added).

We do not necessarily have to agree that, were we the trial court, we would have come to the same conclusion, as did the district court, that the evidence adduced at the sentencing hearing was insufficient to convince it that Porat's actions were willful. Our task is to apply the clearly erroneous standard in reviewing the district court's determination that Porat did not willfully attempt to obstruct justice. *United States v. Cusumano*, 943 F.2d 305, 315 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 881 (1992). If the finding of the district court meets that standard, we will affirm.

The district court found that the letter from the Israeli government did not convince it that Porat willfully altered the passport or willfully submitted a forged document. The court expressed reluctance to rely on this evidence without the ability of Porat to cross-examine someone familiar with the content of the letter. The court then held that the government had failed to prove by a preponderance of the evidence that Porat obstructed justice.

The district court apparently did not agree with the government's argument that lack of evidence that Porat obliterated the third number innocently or by accident was proof that he willfully altered that document. Although we might draw a different conclusion from the evidence presented at the sentencing hearing, we cannot say that the determination of the district court was clearly erroneous.

IV.

The government's final assertion on cross-appeal is that the district court's sentence of five months' supervised release conditioned on home detention in Israel is unlawful. In support, the government contends that only the Attorney General has the authority, pursuant to treaties entered into by the United States, to permit a defendant serving a sentence of imprisonment to serve that sentence in a foreign country. 18 U.S.C. §4100, *et seq.* (implementing procedures for offender transfer treaties with foreign countries).[14] The government contends, correctly, that there is no similar statute authorizing a court to impose a sentence of imprisonment to be served in a foreign country. The government then argues that because under §5C1.1(e)(3) of the Guidelines home detention is simply a substitute for imprisonment, it is the equivalent of imprisonment, and a court cannot impose a sentence of home detention in a foreign country.

Porat is eligible for a sentence, in part, of home detention under §5C1.1(d) of the Guidelines which provides that, if the defendant's sentence falls within Zone C of the Guidelines (as in Porat's case),

---

14. 18 U.S.C. §4102 provides in part:

> The Attorney General is authorized —
>
> (1) to act on behalf of the United States as the authority referred to in a treaty;
>
> . . . .
>
> (3) to transfer offenders under a sentence of imprisonment, on parole, or on probation to the foreign countries of which they are citizens or nationals . . . .

> the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

U.S.S.G. § 5C1.1(d).

Under the schedule for substitute punishments, Guidelines § 5C1.1(e)(3) provides that a defendant afforded home detention must serve one day of home detention for each day of imprisonment. After determining that Porat's minimum sentence under the Guidelines was ten months, the district court sentenced Porat to five months' imprisonment and substituted five months of supervised release conditioned on home detention for the remaining five months of imprisonment.

According to the government, because there is no statutory authority for the courts to allow defendants to serve imprisonment abroad, there is no authority for the court in this instance to permit Porat to serve his home detention outside of the United States. The statute referred to by the government does not, however, apply to the conditions of the sentence imposed here. Section 4102 provides for the transfer of an offender into the custody or supervision of the prison authorities of the transferee nation. It envisages a formal agreement between the officials of two countries that an offender will become the responsibility of the receiving nation.

The sentence imposed on Porat does not, however, place him under the supervision or control of the Israeli government or of its prison authorities. The district court ordered Porat to report to the probation office in the district to which he is released without specifying what district that would be. One can only presume that it would be the probation office of the Eastern District of Pennsylvania.[15]

---

15. It is the probation office of the Eastern District of Pennsylvania with which Porat has been negotiating means of supervision if he should be permitted to perform his home detention in Israel.

The conditions of his home detention were further described as follows:

> Defendant's period of supervised release shall be spent at his home in Israel. During this time, in addition to the standard terms of supervised release, defendant shall comply with whatever reporting requirements are outlined by the Probation Office. The Probation Office is directed forthwith to arrange for defendant's reporting and supervision for this five-month period while defendant is at home in Israel

Sentencing Report at 3.

Porat is required to maintain the normal close interaction with the probation office. He is required to make regular written reports to the probation officer, as well as be available for visits by the officer at any time. We do not see how the probation office can maintain proper oversight of Porat's supervised release if Porat is allowed to serve this portion of his sentence outside of the United States.

We have not found any case in which a court has authorized a defendant to serve a sentence of supervised release outside of the United States.[16] The only case

---

16. There have been instances in which district courts have ordered aliens convicted of unlawful activity to be deported as a condition of their probation. The cases we have reviewed have resulted in reversals. *See United States v. Jalilian*, 896 F.2d 447 (10th Cir. 1990) (holding that district court could not lawfully order alien, guilty of converting a treasury check to his own use, to be deported as a condition of probation even though alien was not legally authorized to be in the United States); *United States v. Abushaar*, 761 F.2d 954 (3d. Cir. 1985), *cert. denied*, 479 U.S. 951 (1986) (holding, *inter alia*, that district court exceeded its authority in imposing condition on alien's probation that he serve probation outside of the United States). The present dispute is distinguishable. Porat's conviction does not amount to an offense for which he could be deported. *See* 8 U.S.C. § 1252 (Attorney General has authority to take into custody for purposes of initiating deportation proceedings any alien convicted of an aggravated felony). Courts may, as a condition of supervised release, provide that an alien defendant who is subject to deportation be deported and remain outside the United States. 18 U.S.C. § 3583(d). The district court did not act pursuant to this section. Neither party has asserted that the court had the authority under § 3583(d) to order that Porat be deported.

analogous to the current dispute is *United States v. Pugliese*, 960 F.2d 913 (10th Cir. 1992), in which the court of appeals considered whether the defendant's sentence could be modified to allow him to serve his supervised release outside of the United States. The defendant, a United States citizen, was convicted of trafficking in heroin and counterfeit goods and sentenced to seventy-eight months in prison and four years' supervised release. While imprisoned, Pugliese sought the court's permission to serve his supervised release in Thailand where his wife and child lived. The district court denied the defendant's motion, noting that it knew "of no way for supervised release to take place outside of the United States." *Id.* at 915 (internal quotations omitted).[17]

While the court of appeals in *Pugliese* found "no direct [legal] impediment to authorizing a person on supervised release to leave the United States, if the supervision the judge believes is necessary can be enforced abroad," it upheld the district court's decision denying the defendant's motion. *Id.* In affirming the district court's decision, the court of appeals considered the terms of the defendant's supervised release, including regular, frequent monitoring by a trained probation officer. It held, as did the district court in that case, that these conditions could not be met in Thailand.

Unlike the supervised release ordered in *Pugliese*, the district court here ordered home detention as a condition of Porat's supervised release. In terms of the types of requirements that might be imposed as a condition of supervised release, home detention is perhaps the most

---

17. The government argues that, even if effective oversight and enforcement of supervised home release were possible in Israel, the district court lacks the authority to order supervised home release abroad in light of the presumption " 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 1230 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285, 69 S. Ct. 575, 577 (1949)). We need not reach this issue because we hold that neither the probation office nor the district court could assure Porat's compliance with the terms of his sentence if he were permitted to serve a portion of it in Israel.

serious and most constraining in terms of the impact it has on the defendant's liberty.[18] Given the seriousness of the sentence, proper supervision is required.

Having determined that home detention is suitable in this particular instance, there must be assurance that the defendant complies with his sentence. To do so, the probation office must closely monitor his actions. In order that the probation office effectively perform its responsibilities, we believe that Porat must serve his home detention in the United States. It is not clear that the probation office could properly ensure that Porat is complying with his sentence if he is allowed to serve his term of supervised release in Israel.

Porat maintains that the probation office has entered into a contract with an American company to maintain electronic monitoring during his home detention in Israel. Even with this monitoring, there is no substitute for the supervisory role performed by the probation officer.

In addition, there is a serious question of the ability of the district court to enforce the home detention aspect of Porat's sentence if he violates the court's order. In his brief to this Court, Porat maintains that he would waive any right to contest extradition to the United States if he is found to have violated any of the conditions of his

---

18. This is the reason why home detention may only be ordered as a substitute for imprisonment. U.S.S.G. §5F1.2. The Application Note to Guidelines §5F1.2 provides:

> "Home detention" means a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, educational or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are effective as electronic monitoring.

U.S.S.G. §5F1.2, comment. (n.1).

supervised release. In addition, Porat suggests that he is a frequent traveller to this country, and should he violate the provisions of his sentence, the United States could regain custody over him. Lastly, Porat proposes that the United States retain his bail until his sentence is completely served. We find these suggestions insufficient to ensure that Porat will serve his time in the manner directed by the district court. In the first place, they do not provide for ongoing contact with a supervising probation officer. Of equal significance is the fact that, should Porat violate the conditions of home detention and decide to end any cooperation with the district court, the district court might find it difficult, or even impossible, to bring Porat before it to consider appropriate remedial measures.

Under the Guidelines, Porat's minimum sentence must be served. The district court clearly had the authority under the Guidelines to substitute supervised release conditioned on home detention for one-half of Porat's minimum sentence. Accordingly, the court and the probation office have the responsibility to see that Porat complies with the terms of his sentence. In order to maintain the required supervision, we hold that Porat must serve his complete sentence in the United States.

This situation is different than that posed by a United States citizen on probation who is given permission by the court to travel. The permission to take a specific trip, with the probationer's return guaranteed as appropriate by secured bond or other safeguards, is not comparable to the supervision required over a five-month period of home detention. Although the defendant has recommended several remedies to ensure his compliance with the conditions of his home detention, we do not find them sufficient to justify relaxing the district court's obligation to insure that Porat comply with the ongoing supervision involved in this type of sentence.

Both the United States and Porat have noted in their briefs to this Court their agreement that, if we determine that the district court lacked the authority to permit Porat to serve his home detention in Israel, Porat should serve home detention in the United States. This would comply with the law.

V.

For the foregoing reasons, we hold that the district court did not err in its decision not to enhance Porat's offense level. We will affirm the court in this respect. However, we will vacate that part of the court's sentence which permitted Porat to serve five months of his sentence in Israel and we will remand for resentencing to provide that the home detention portion of Porat's sentence be served in the United States.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-1095; 93-1176; 93-1242; 93-1243

UNITED STATES OF AMERICA

v.

AMIR PORAT,

Appellant in 93-1095 and 93-1242

UNITED STATES OF AMERICA

Appellant in 93-1176 and 93-1243

v.

AMIR PORAT

SUR PETITION FOR REHEARING

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENSBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, Circuit Judges

The petition for rehearing filed by appellant, Amir Porat, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Jane R. Roth
Circuit Judge

Dated: April 14, 1994

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNYSLVANIA

UNITED STATES OF AMERICA
v.
AMIR PORAT
NO. 92-96

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J. JANUARY 5, 1993

Defendant Amir Porat ("Porat") was indicted on March 3, 1992, on two counts for making false statements to a grand jury, inviolation of 18 U.S.C. §1623. After extensive colloquy between the court and the defendant, defendant's request to represent himself was granted. However, he had the assistance of retained counsel before, during, and after his trial. Following a jury trial, Porat was found guilty on count II; the jury was unable to reach a verdict and a mistrial was declared on Count I.

The defendant filed a timely motion for judgment of acquittal on both counts, under Fed. R. Crim. P. 29, and for a new trial on Count II, under Rule

33.[1] A hearing on defendant's motion was held on December 4, 1992. For the reasons stated on the record of that hearing, and in this Memorandum, the court will deny defendant's motion.

I. BACKGROUND

The Government had the burden of proving the material elements of each count beyond a reasonable doubt. The material elements of 18 U.S.C. §1623 are: (1) statement made under oath; (2) in a proceeding before a grand jury; (3) which is knowingly; (4) and materiality; (5) false.[2]

Porat testified before a grand jury on May 17, 1989. The indictment charged that the grand jury was conducting an investigation, inter alia, into whether Porat or his company, I.M., Inc. ("I.M."), had engaged in bid-rigging with a competing company, Fraass Survival Systems, Inc. ("Fraass"). Both of these

[1] By order of December 7, 1992, the court continued retrial on Count I until final disposition of Count II. The Government has agreed to seek a new trial on Count I only if there is a new trial on Count II.

[2] Although each count charged more than one materially false declaration, the jury was only required to unanimously find beyond a reasonable doubt that one particular such statement was knowingly false in order to return a guilty verdict on the respective count. See United States v. Makris, 483 F.2d 1082, 1087 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). The jury was so charged. (Tr. 10/26/92, at 136 - 37).

companies submitted bids on certain military bandage contracts awarded by the Defense Personnel Support Center of the Defense Logistics Agency of the United States Department of Defense ("DPSC").

The indictment charged that it was material to the grand jury's investigation, in order to determine Porat's relationship with Fraass, to determine whether Porat received a $200,000 check issued by Fraass to Credit Suisse, and whether Porat ever had a bank account in Switzerland.

In Count I, Porat was charged with testifying falsely by denyig that on or about December 19, 1984, he received a check issued by Fraass to Credit Suisse in the amount of $200,000. The indictment quotes a series of questions and allegedly false answers regarding the check, in Grand Jury testimony covering 29 pages of transcript. For example, Porat's answer was charged as false in the following exchange:

> Q. I said if this grand jury were to hear testimony from witnessess that on or about December 19th, 1984, you received this check in the offices of Fraass Survival

Systems, those witnesses would be lying? Is that what you're saying?

A. Absolutely, I never received any check.

(Indictment, at 4),[3]

In Count II, Porat was charged with testifying falsely by denying that from on or about October 8, 1984, up to and including May 17, 1989 (the date of his grand jury testimony), he had one or more bank accounts at Credit Suisse in Zurich, Switzerland. For example, Porat's underscored answers were charged as false in the following exchange:

Q. Mr. Porat, this grand jury has heard that you do have an account in a Swiss Bank.

A. I wish I had. I don't have.

Q. And that you gave you gave your account name code to Colin Offenhartz at Fraass and that Mr. Offenhartz added a Fraass check to your coded account for $200,000. Is that true?

A. Absolutely not. Absolutely not. I don't have a Swiss account. He couldn't transfer it to my account.

[3] The allegedly false testimony was underlined in the indictment, to distinguish it from testimony included in the indictment but not charged as false.

> Maybe you let me know where is the money. I need the money. I can take it. Never, ever. Was it in one installment, over many installments, or what? I never ever had an account and never, ever transferred money.

(Indictment, at 6).

II. STANDARD OF REVIEW

A. Judgment of Acquittal

On a motion for judgment of acquittal, the court's review of the sufficiency of the evidence is confined by strict deference to the jury's findings. See United States v. McGill, 964 F.2d 222, 229 (3d Cir. 1992), cert. denied, 1992 WL 232408 (U.S. Dec. 7, 1992); United States v. Coleman, 862 F.2d 455, 460 (3d Cir. 1988), cert. denied, 490 U.S. 1070 (1989). "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." United States v. Aquilar, 843 F.2d 155, 157 (3d Cir. 1988), cert. denied sub nom., Sosa v. United States, 488 U.S. 924 (1988). The court may not weigh evidence or assess credibility, but must determine whether, if the Government is given the benefit of all inferences

reasonably drawn from the evidence, a rational factfinder could have found guilt beyond a reasonable doubt. See United States v. Leo, 941 F.2d 181 (3d Cir. 1991); Colement, 862 F.2d at 460; United States v. Miah, 433 F. Supp. 259, 264 (E.D. Pa. 1977), aff'd without opinion, 571 F.2d 573 (3d Cir. 1978); United States v. Phifer, 400 F. Supp. 719, 724 (E.D. Pa. 1975), aff'd without opinion, 532 F.2d 748 (3d Cir. 1976).

B. New Trial

Under Rule 33, the court may grant a new trial "in the interest of justice." Whether to grant a motion for new trial because the verdict is against the weight of the evidence is committed to the sound discretion of the trial court. The court may weigh the evidence and credibility of witnesses; if the court determines that the verdict constitutes a miscarriage of justice, the court may set aside the verdict and order a new trial. See United States v. Bevans, 728 F. Supp. 340, 343 (E.D. Pa. 1990) (citing cases), aff'd without opinion, 914 F.2d 244 (3d Cir. 1990). Although such a determination lies within the trial court's sound discretion, this remedy is to be used sparingly in

"exceptional circimstances," where the evidence preponderates heavily against the verdict. See Phifer, 400 F. Supp. at 722 (E.D. Pa. 1975); United States v. Martorano, 596 F. Supp. 621, 624 (E.D. Pa. 1970), aff'd, 767 F.2d 63 (3d Cir. 1985). The court mst also grant a new trial if there is a reasonable probability that "error infecting the prior proceedings could have had a substantial influence on the jury's decision." Bevans, 728 F. Supp. at 343 (citing Virgin Islands v. Bedford, 671 F. 2d 758, 762 (3d Cir. 1982)).

III. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE VERDICT; THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE[4]

A Count One

In Count I, Porat was charged with making false statements to the grand jury, regarding whether

[4] Although raised at paragraph 1 and 2 of his Motion, Porat has not explicitly briefed this point. However, the Court will generally address the evidence that Porat's grand jury testimony was knowingly false. Porat's supporting Memorandum argues at length that the court erred in its evidentiary rulings. Thesarguments are addressed infra. Apparently, Porat takes the view that the verdict was against the weight of the evidence because he considers much of the evidence presented was inadmissible. However, since the court finds that it did not commit error, or that any error was harmless, the court has considered all of the evidence in reaching its determination that Porat is not entitled to judgment of acquittal on either count, nor to a new trial on Count II.

he had received, or knew about, a $200,000 check to Credit Suisse allegedly given to Porat. The jury was unable to reach a verdict on this count, and the court declared a mistrial.

Although the jury did not reach a verdict on Count I, the evidence, if believed by the jury, would have supported a guilty verdict. Colin Offenhartz identified the check and testified that he gave it to Porat. (Tr. 10/20/92, at 119). Philip Frobey identified the check and testified that it was Porat's commission, prepared at Frobey's direction. (Tr. 10/21/92, at 233). Robert Knorr testified that Porat received a payment from Fraass, Offenhartz's company. (Tr. 10/21/92, at 261).[5]

Each of these witnesses testifid under an immunity agreement with the Government. The court recognizes that some of the jurors may not have found their testimony credible, and cannot say whether the Government would be more successful

[5] Porat argues that the court improperly admitted hearsay statements of Offenhartz, Frobey, Knorr, and of Siragusa. See Porat Motion paragraph 5-7; Porat Memorandum at 26-27. However, the challenged testimony was not hearsay, under Fed. R. Evid. 801 (d)(2)(e), because the court determined that these persons were co-conspirators. See Bourjaily v. United States, 483 U.S. 171, 182-83(1987); United States v. Gibbs, 739 F.2d 838, 843 (3rd Cir. 1984), cert. denied, 469 U.S. 1106 (1985)

before another jury. However, the court may not assess credibility on a motion for judgment of acquittal. A rational factfinder could have found Porat guilty beyond a reasonable doubt on count I.

B. Count Two.

In Count II, Porat was charged with making false statemtns to a grand jury regarding whether he then, or ever, had a Swiss bank account. On this count, the jury returned a verdict of guilty.

There was extensive testimonial and documentary evidence that prior to his grand jury testimoy POrat held not one, but three secret Swiss bank accounts, under the code names of CAMBER, BERCAM, AND EGEMAN. There was evidence that Porat opened these accounts personally. See Tr. 10/21/92, at 140-85; 10/23/92, at 176-222 (Peter Sturzinger). Although Porat presented evidence that tahese accounts were opened in his name without his knowledge, a rational factfinder could have found Porat guilty beyond a reasonable doubt n the evidence presented.

Neither was the verdict against the weight of the evidence. Deot entitled to judgment of acquittal or a

new trial on Count II.

IV. PORAT'S GRAND JURY TESTIMONY WAS MATERIAL

Porat argues that the government's failure to prove the requisite element of materiality entitles him to judgment of acquittal on both counts. See Porat Motion paragraph 3; Porat Memorandum at 2-5. Materiality is a question of law for the trial court. See United States v. Crocker, 568 F.2d 1049, 1057 (3d cir. 1977). Materiality may properly be determined pretrial. see United States v. Phillips, 674 F. Supp. 1144, 1146 (E.D. Pa. 1987); the Government moved for such a pretrial determination. However, at the hearing on pretrial motions, the court stated that it would defer its finding on materiality "until I've heard the Government's evidence." (Tr. 10/13/92, at 52).

A perjurious statement is material if it has a natural tendency to influence, impede, or hamper the grand jury pursuing its investigation. See United States v. Lardieri, 497 F.2d 317, 319 (3d Cir. 1974), on rhg, 506 F.2d 319 (3d Cir. 1974). There is no requirement that the statement has actually impeded the grand jury. See United States v. Schiavo, 375 F.

Supp. 475, 477 (E.D. Pa. 1974), aff'd, 506 F.2d 1053 (3d Cir. 1974). The false testimony need not relate directly to the primary subject of the investigation; if it is "relevant to any subsidiary issue under consideration by the tribunal." it is material. Schiavo, 375 F. Supp. at 477.

The court ruled at the conclusion of the Government's case in chief that Porat's grand jury testimony was material. (Tr. 10/22/92, at 97). The evidence supporting the court's ruling included:

- The transcript of Porat's May 17, 1989, grand jury testimony (Government's Exh. No. 4);

- The testimony of Kimberly Pepper, the grand jury court reporter;

- The testimony of Colin Offenhartz.

This evidence established that the grand jury before which Porat testified was investigating bid-rigging on military bandage contracts awarded by the Defense Department, including bid-rigging between Fraass and Porat's company, I.M. As part of that investigation, the grand jury examined the circumstances surrounding a $200,000 check issued by Fraass to Credit Suisse. The grand jury transcript

shows that Porat was questioned about suspected bid-rigging between Fraass and I.M.; Porat denied bid-rigging. His testimony contradicted the earlier grand jury testimony of the President of Fraass, Colin Offenhartz. Offenhartz also testified about a $200,000 check he gave to Porat. Porat's denial of this event had a natural tendency to cast doubt on the credibility of Offenhartz's testimony, and to foreclose the grand jury's line of inquiry in questioning Porat. Therefore, his answers were material.

Porat contends that the Government was obligated to present testimony of the grand jury foreman. This is not so, because the Government introduced sufficient evidence to establish the scope of the grand jury's investigation, and allow the court to determine the materiality of the questions at issue.

V. THE COURT DID NOT COMMIT ERROR IN ALLOWING LIMITED EVIDENCE OF THE ALLEGED BID-RIGGING BETWEEN I.M. AND FRAASS

The admissibility of evidence concerning bid-rigging was extensively argued pretrial. The court ruled:

> The Government may introduce evidence in order to establish the allegations of the indictment regarding the $200,000 check, but the Government

> may not offer unrelated evidence of an alleged bid-rigging conspiracy involving Defendant except if permitted following an offer of proof outside the presence of the jury.

Order of October 14, 1992. At trial, the court allowed some evidence of the bid-rigging activity as "background" necessary to provide the jury with a contextual unding of the current charges.

The decision whether to admit evidence under Fed. R. Evid. 404(b) is a matter for the sound discretion of the court. See United States v. Traitz, 871 F.2d 368, 389 (3d Cir. 1989), cert. denied, 493 U.S. 821 (1989). In the Third Circuit, Rule 404(b) is considered "a rule of 'inclusion' rather than 'exclusion.'" United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988), cert. denied, 488 U.S. 910 (1988). Evidence of uncharged crimes may be admissible as background at trial. See, e.g., Government of Virgin Islands v. Harris, 938 F.2d 401, 419 (3d Cir. 1991); Government of Virgin Islands v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990); United States v. Traiz, 871 F.2d 368, 389 (3d Cir. 1989), cert. denied. 493 U.S. 821 (1989); Scarfo, supra; United States v. Driggs, 823 F.2d 52, 54 (3d Cir. 1987);

United States v. O'Leary, 739 F.2d 135, 136 (3d Cir. 1984), cert. denied, 469 U.S. 1107 (1985); United States v. Simmons, 679 F.2d 1042, 1050 (3d Cir. 1982), cert. denied, 462 U.S. 1134 (1983); United States v. Long, 574 F.2d 761, 765 (3d Cir. 1978), cert. denied, 439 U.S. 985 (1978). Defendant's reliance upon United States v. Roenick, 810 F.2d 809 (8th Cir. 1987) is misplaced, as the court explained at the pretrial motions hearing, at the trial, and at the post trial motions hearing.

In reviewing a district court's exercise of discretion in admitting evidence of other crimes for purposes other than showing the character of the person and that the person acted in conformity therewith, four factors are considered:

(1) the other crimes evidence must have a proper purpose;

(2) the proffered evidence must be relevant under Fed. R. Evid. 402 as enforced through Rule 104(b);

(3) its probative value must outweigh its potential for unfair prejudice under Rule 403 balancing; and

(4) the court must charge the jury to consider the other crimes evidence only for the limited purpose

for which it is admitted.

Edwards, 903 F.2d at 270.

These conditions were satisfied. The court gave the following limiting instruction to the jury:

> Now, I want to make clear to you, that you are not to concern yourself with whether Amir Porat was in fact, involved in what we called bid-rigging with Fraass or anyone else in violation of the Antitrust Lasws. The Antitrust Laws are not before you and I only allowed that evidence to come in as to Mr. Porat, because I wanted you to understand the background of the check and why the Government -- the alleged check -- why the Government was asking these questions before a Grand Jury.
>
> In other words, it seemed important for you to know the context. But, I want to make clear that Mr. Porat was not indicted for bid-rigging or violation of the Antitrust Lawand you're not to determine that. I ought to add, I let evidence of this come in with regard to Colin Offenhartz, so that you could understand and evaluate whether his convictions and admission of false statements would effect [sic] how you credit him or how you weigh -- evaluate his testimony.

(Tr. 10/6/92, at 132).

In light of the court's clear jury instruction, and relevant case law, the court did not commit error in admitting evidence of alleged bid-rigging activities.

VI. THE DEFENDANT HAS NOT SHOWN THAT OFFENHART'S TESTIMONY WAS FALSE, NOR THAT THE GOVERNMENT WAS AWARE OF ANY FALSE TESTIMONY BY COLIN

OFFENHARTZ

Porat claims that prosecution witness Colin Offenhartz testified falsely, the Government knew it, and improperly "sat on their hands," rather than correcting Offenhartz's false statements, and that Porat is therefore entitled to judgment of acquittal or a new trial. Seee Porat Motion ¶ 8; Porat Memorandum at 48-52.[6]

Porat raises four instances of allegedly false testimony uncorrected by the Government:[7]

> Aliegation No. 1. Offenhartz lied when he testified at trial that the $200,000 check Porat allegedly accepted was typewritten, because he testified before the grand jury that it was handwritten. See Porat Memorandum at 49.

The grand jury testimony quoted by Porat (gj. 2/4/92, at 28-29) does not support Porat's contention that Offenhartz lied at trial when he testified that the $200,000 check was typewritten. See Porat

[6] Although this argument applies wholly to Count I, in which a mistrial was declared, the Court addresses the issue because of the gravity of this allegation of prosecutorial misconduct.

[7] In addition, Porat claims that Offenhartz testified that his own trial for bid-rigging lasted 4 or 5 days, when in fact it lasted from August 22, 1988, until September 2, 1988. See de minimis; the Defendant was free to cross-examine Offenhartz about the length of his trial.

Memorandum at 49.[8] Offenhartz could have been referring to the check itself or to entries made in Fraass' books. Before the grand jury, Offenhartz identified a typewritten check as the one he gave to Porat (gj (3/22/89, at 28; 2/4/92, at 24-25). See Government Memorandum at 47 & nn. 28 & 29). Porat's interpretation of Offenhartz' grand jury and trial testimony does not conclusively demonstrate that Offenhartz lied at trial or that the Government permitted Offenhartz to testify falsely.

> Allegation No. 2. When Porat cross-examined Offenhartz about whether the check Porat allegedly accepted was handwritten, Offenhartz lied when he answered that he was referring to the handwritten entry of the check on Fraass' books, because he had testified earlier that s never entered on the books. See Porat Memorandum at 49-51.

Porat cross-examined Offenhartz regarding what was handwritten or typewritten; Offenhartz stated that it was the accounting book entries ("how it lays

[8] In his Memorandum, at 49, Porat quotes the following grnad jury testimony of Colin Offenhartz:

> We didn't want any employee to know about the check, and we wanted to -- the check anhe way it was handled in the books was handled in such a way that for taxes and everything the IRS would have had. It would be the same. Nothing wchanged. It was just so it didn't show up, it didn't lay out in some register. I haven't the faintest idea, other than I know it was handwritten.

out in the register in the books"), (Tr. 10/20/92, at 198), that were handwritten, not the check. See Porat Memorandum at 50.

Porat contends the trial and grand jury testimony of Offenhartz and Philip Frobey establish that "the check was not entered in the books." Id. Whether or not the check itself was entered on Fraass' books, it is possible that book entries were made to disguise the receipt of $200,000. Porat recognizes that Frobey testified this is what occurred. See Porat Memorandum at 50. Offenhartz' trial testimony that entries in Fraass' cash receipts and sales journals were handwritten is not necessarily inconsistent with not having entered the check itself on the books. See Government Memorandum at 47.

The jury was free to find Offenhartz' testimony obfuscatory or false, but Porat has not shown that the Government knowingly permitted Offenhartz to testify falsely at trial.

Allegation No. 3. Offenhartz lied about his "mad-man theory of bidding." See Porat Memorandum at 51.

Porat contends that Offenhartz lied at trial in testifying (Tr. 10/20/92, at 221) that he randomly

varied his bid princes in order to "never leave a pattern to other potential bidders, of where my price might be at any given time." See Porat Memorandum at 51. Porat further contends that the Government knew this testimony was false, because at Offenhartz's trial, the Government argued that the "mad-man" theory was not a defense to the illegal bid-rigging with which Offenhartz was charged. See id. By "other potential bidders," Offenhartz could have been referring to true competitors, as opposed to those with whom he had collusive agreements. Porat has not shown that Offenhartz necessarily lied at trial or that the Government permitted Offenhartz to testify falsely.

> Allegation No. 4. Offenhartz lied when he testified that the check Porat allegedly accepted was written on and dated December 19, 1984, not backdated as he h ad earlier told the Government. See Porat Memorandum at 51-52.

Porat argues that Offenhartz' trial testimony that the second $200,000 check, dated December 19,. 1984, was not backdated, but actually written on that date, was a lie, known to the Government. See Porat

Memorandum at 51-52.[9] Porat's "evidence" of this falsehood is a statement made by the Government, in its March 12, 1990, request to Switzerland for information under the Mutual Legal Assistance Treaty, that the second check was "backdated to December 19, 1984." Id. Porat has not shown Offenhartz' testimony was inconsistent with any statements or testimony of Offenhartz himself. The Government states that: "the source of the [treaty request] information was a confidential informant who anonymously contacted the Government . . . .Subsequent investigation established that certain of the information provided by this confidential source was . . . mistaken." Government Memorandum, at 49. If the discrepancy is "significant," as Porat states in his Memorandum, at 52, it was an appropriate area for

[9] Offenhartz testified that he gave two different $200,000 checks to Porat. The first was made out to a code name and number. (Tr. 10/20/92, at 118). According to Offenhartz, Porat returned that check to him, in exchange for a second check, made out to Credit Suisse. (Tr. 10/20/92, at 119). He testified on cross-examination that he gave the first check to Porat between December 14 and December 19, 1984. (Tr 10/21/92, at 18). The false statements charged in Count I concerned the second check. The Government placed in evidence an unnumbered $200,000 typewritten check, dated December 19, 1984, and made out to Credit Suisse. (Government Exh. 17).

cross-examination.[10] The court is not able to find that the Government permitted Offenhartz to testify falsely.

Where the Government has knowingly introduced false testimony, or allowed false testimony to go uncorrected, a defendant convicted on such testimony is denied due process. See Napue v. Illinois, 360 U.S. 264, 269-70 (1959). The burden of establishing perjury is on the defendant. See United States v. Scarfo, 711 F. Supp. 1315, 1322 (E.D. Pa. 1989), aff'd sub nom., United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), cert. denied, 111 S. Ct. 2010 (1991). "The defendant[ ] must show more than mere inconsistencies in testimony by government witnesses; the defendant[ ] must meet the heavy burden of showing that the testimony was knowingly false." Scarfo, 711 F. Supp. at 1322. Porat has failed to meet this "heavy burden." See also United States v. Harris, 498 F.2d 1164, 1169 (3d Cir. 1974) ("it

[10] The Treaty request referred to was in Porat's possession before trial. Porat cross-examined Offenhartz on October 20 and 21, 1992. This cross-examination included, inter alia, questions concerning the $200,000 checks and other Fraass checks. (Tr. 10/20/92, at 191-99, 227-235; 10/21/92, at 36-49). Porat offers no basis for his contention, Porat Memorandum at 52, that the Government failed to provide him with all Brady material.

should be obvious to the Government that the witness' answer, although made in good faith, is untrue"), cert. denied sub nom., Young v. United States, 419 U.S. 1069 (1974). Here, it was not obvious. Porat is not entitled to post-trial relief on the basis of Offenhartz' allegedly false testimony.

VII. THE DEFENDANT IS NOT ENTITLED TO JUDGMENT OF ACQUITTAL UNDER UNITED STATES V. BRONSTON

Porat claims that judgment of acquittal must be entered as to both counts, under United States v. Bronston, 409 U.S. 352 (1973). See Porat Motion ¶ 25; Porat Memorandum at 6-13.[11] InBronston, the Court held that a defendant could not be convicted under a federal perjury statute where the alleged "false" answers were literally true although unresponsive to the questions asked, even if the answers were false by "negative implication," and intended to mislead the questioner. Id. at 357-59. However, Porat's answrs before the grand jury charged in the indictment were responsive to the questions asked, and the jury could have found that

[11] However, Porat did not brief this argument as to Count I.

they were knowingly false.[12]

The crux of Porat's argument is that he denied having "an account" before the grand jury while the government's evidence at trial showed that he had two accounts,

> The government's proof at the time the defendant testified, in May 1989, was that in 1984 Mr. Porat had an account by the name of Camber, which account was closed in 1987. In 1987, a second account, Bercam, was opened and in April 1989 a third account was opened. These latter two accounts both existed at the time Mr. Porat testified (in May 1989) and both were closed in May 1990. Therefore, Mr. Porat's response to the government's question, "At what Swiss bank do you have an account?" (or "At what Swiss bank do you have one account?"), is literally true because by the government's own proof Mr. Porat did not have one account, but two.

Porat Memorandum at a (emphasis supplied in Porat Memorandum). The argument that having two accounts is not having an account is clever but not

[12] Porat would have the court read Bronston as dictating that an answer which is actually false but unresponsive cannot support a conviction for making false statements. See Porat Memorandum at 11 ("[T]he answer is not responsive to the question . . . . . On that basis alone, the conviction should be reversed."). Bronston did not consider that issue because the answers there were literally true. See also United States v. McComb, 744 F.2d 555, 565 n.11 (7th Cir. 1984) ("We know of no reason . . . to shield one who volunteers false information from liability for perjury.").. Accordingly, the court will not dwell on whe Porat's statements were responsive to the questions put to him.

persuasive. The question appearing parenthetically in the paragraph just quoted -- "At what Swiss bank do you have one account?" -- is not the question Porat was actually asked. Porat's answer was responsive to the question he was asked; the jury could have reasonably found the answer false by giving both the question and the answer their natural meaning in context. See United States v. Schafrick, 871 F.2d 300, 303-04 (2d Cir. 1989).[13]

At the request of the Deendant, the jury was

[13] If Porat had two accounts, then he certainly had one account, and the jury could hound his statements false, even if given in response to the paraphrased question Porat claims he was asked. The court also rejects Porat's claim that his admission before the grand jury that his company, I.M., had a Swiss bank account at Corporation Bank, provides grounds for judgment of acquittal under Bronston, since Porat's statements charged as false denied any personal accounts. See Porat Memorandum at 12-13, Exh. A.

instructed regarding the law under Bronston[14] The truth or falsity of Porat's statements before the gran jury was a question for the jury. Under the standard of Rule 29, or Rule 33, Bronston does not require the

[14] The court instructed the jury as follows (Tr. 10/26/92, at 135-36):

Now, lets talk about falsity, because that is one of the essential elements. You have to decide whetr the testimony that the defendant gave was false. That means, not truthful, contrary to the truth. It mes more than an innocent error or a mistake. It's false if it was untrue when made and it was known to be utrue by the person making it. And it's the burden of the Government to show that those statements were false.

It follows that it's a defense to the charge of making false material statements to a Grand Jury. If the evidence shows that the defendant made a statement in response to a question that was ambiguous or capable of being understood in more than one way. And the answer given by the defendant to one reasonable interpretation of the ambiguous questions, wasn't false. Or that the defendant made a statement in response to questions that was clear and unambiguous, but the answer was ambiguous and was capable in being understood in more than one way. And one reasonable interpretation of the answer gien by the defendant was not false.

As long as the answers are literally or technically true, the crime of making a false statement to a Federal Grand Jury hasn't been committed. And if it's a true statement, it doesn't matter if the defendant wastrying to confuse or abate or had some other intent.

In deciding whether the defendant's answers are false, you give the answers their natural meaning in the context of which the words were used. If you find the answr given by the defendant was literue, you can find the answer wasn't false even if it was unresponsive to the question that was asked.

court to disturb the jury's decision.[15]

VIII. DEFENDANT IS NOT ENTITLED TO JUDGMENT OF ACQUITTAL ON THE BASIS OF CLAIMED "LANGUAGE DIFFICULTY AND

[15] In his Motion, ¶ 18, Porat offers as error the court's refusal to charge the jury that his grand jury testimony "was like any other piece of evidence and had to be evaluated as to accuracy and content." The point is mentioned in Porat's Bronston argument, although no authority is cited. See Porat Memorandum at 7-8. During a sidebar conference at the conclusion of the court's delivery of the jury charge, Porat reque such an instruction for the first time, without citation to authority. (Tr. 10/26/92, at 145). The request was denied as untimely and unwarranted. During trial, Porat cross-examined the grand jury reporter regarding the accuracy of transcription. (Tr. 10/20/92, at 37-43). He raised the question again in his closing argument. (Tr. 10/26/92, at 69-70). The jury was fully and properly instructed regarding the government's burden to prove the elements of the crime charged beyond a reasonable doubt. (Tr. 10/26/92, at 131, 134-39), Porat's argument about this requested instruction also provides the answer: if the transcripts were to be considered "like any other piece of evidence," the court's decision not to emphasize to the jury this particular evidence was not error, or in any event, harmless.

Porat also claims as error, but did not brief, that the court did not sufficiently instruct the jury that "knowingly" must be proven beyond a reasonable doubt. See Porat Memorandum § 17. The portions of the court's instructions just cited fully advised the jury that it could find defendant guilty only if it found beyod a reasonable doubt that the defendant acted "knowingly."

PRONUNCIATION."[16]

Mr. Porat's native language is Hebrew. The court considered the matter of his English language competency before trial. During pretrial colloquy, the court provided Porat with a list of Hebrew interpreters authorized to serve in this court. (Tr. 10/19/92, at 3). Mr. Porat stated: "Your Honor, I consider it. I don't think I need an interpreter, and I definitely don't want to go into the expense . . . ."(Id.). During the colloquy, Porat stated that he has always conducted business in the United States in English. (Id. at 8).[17] The court determined that Porat was competent in the English language:

> The Court finds Mr. Porat competent for purposes of this colloquy, and also for the purposes of conducting these proceedings in

[16] not raise the issue of language difficulties. However, in discussion of the claimed Bronston defense, Porat states that there was "a high degree of likelihood that mistakes were made during the May 17, 1989, questioning of Mr. Porat due to the language difficulty and pronunciation of the defendant," and "[t]hroughout the instant trial it became clear that the court transcribers, even with the benefit of recording devices, had great difficulty in making an accurate transcription." Porat Memorandum at 7-8 & n.6. Evidence of said "great difficulty" is not offered.

[17] The court asked: "And have you always conducted business in English?" Porat responded: "Yes, I did. The only problem I have in English is I have a problem in writing English, but in talking and reading it's okay." (Tr. 10/19/92, at 8).

> English, bearing in mind that the Grand Jury at which Mr. Porat voluntarily testified was conducted in English and there was no request for an interpreter at that time.

(Id. at 10).

Mr. Porat acted as his own attorney at his trial; the Court did not observe significant language difficulties in his conduct of the defense. The court has read the trial transcripts; the court has not observed significant language-related transcription errors.

Mr. Porat cross-examined Kimberly Pepper, the grand jury stenographer, regarding her ability to understand his grand jury testimony. She testified that she understood him. (Tr. 10/19/92, at 37). The court asked Ms. Pepper whether her "transcription was inaccurate." to which she responded: "I don't agree. What I transcribed is what I took down, and I don't feel that it was inaccurate." (Id., at 40). Porat also contested the accuracy of the grand jury transcription in his closing argument to the jury. (Tr. 10/26/92, at 69-70). See United States v. Long, 534 F.2d 1097, 1100 (3d Cir. 1976) ("Whether the defendant[ ] . . . understood the terms used by the

prosecutor is . . . a question of fact" for the jury).[18]

It is clear that neither Porat's claim of language difficulty with respect to the grand jury testimony, nor with respect to his conduct of his own defense at trial, entitle him to judgment of acquittal.

IX. DEFENDANT'S REMAINING CLAIMS ARE WITHOUT MERIT

Porat's claims not specifically discussed do not entitle him to a new trial or judgment of acquittal. The court's evidentiary rulings were not in error, or any errors committed were harmless, and not likely to have had a substantial influence on the jury's decision.[19] With respect to discretionary matters, the court's exercise of discretion was not in error.[20] Other matters raised by Porat were not likely to have had a substantial influence on the jury's decision, and curative instructions issued by the court were appropriate and effective.[21]

An appropriate Order follows.

---

[18] See also n.15, supra.

[19] Evidentiary rulings are challenged in Porat's Motion at § 6, 9-15.

[20] The exercise of the court's discretion is challenged by Porat in his Motion at §§ 16, 24.

[21] or's conduct is challenged in Porat's Motion at §§ 19 - 23.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	
	:	
AMIR PORAT	:	No. 92-96

ORDER

AND NOW, this 5th day of July, 1994, upon consideration of Defendant's Motion for Judgment of Acquittal and/or for a New Trial, and supporting Memorandum of Law, and the Response of the Government in opposition thereto, after oral argument, and for the reasons stated on the record and in the accompanying Memorandum, it is ORDERED that said Motion is DENIED.

Norma L. Shapiro
J.

United States District Court
District of Eastern Pennsylvania

Judgment in a Criminal Case

United States of America

v.

Amir Porat

Case No.2:92CR00096-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 5 months.

5 months as t Count(s): 2

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 months

5 months as t Count(s): 2

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised releasee, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with

supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this judgment. The defendant shall comply with the following additional conditions:

Defendant's period of supervised release shall be spent at his home in Israel. During this time, in addition to the standard terms of supervised release, defendant shall comply with whatever reporting requirements are outlined by the Probation Office. The Probation Office is directed forthwith to arrange for defendant's reporting and supervision for this 5 month period while defendant is at home in Israel.. A fine of $10,000 has been imposed on Count 2, together with a Special Assessment of $50. These amounts shall be paid in full prior to the expiration of defendant's supervised release. Defendant's actual or contingent bail, as outlined in an "Affidavit and Assignment" filed of record on June 12. 1992, remain as security for paypment of the fine.

1/19/93
Date of Imposition of Judgment

Hon. Norma L. Shapiro
Judge USDC EDPA

A 56

Supreme Court, U.S.
FILED
SEP 23 1994
OFFICE OF THE CLERK

No. 94-140

In the Supreme Court of the United States

OCTOBER TERM, 1994

AMIR PORAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the materiality of a false declaration, in violation of 18 U.S.C. 1623, is a question of law for the court, rather than an issue of fact for the jury.

2. Whether the government established that petitioner's false declaration was material to the grand jury's investigation.

3. Whether a district court may sentence a defendant to serve the home detention portion of a split sentence in a foreign country.

4. Whether the trial court acted within its discretion in admitting evidence under Rules 404(b) and 801(d)(2)(E) of the Federal Rules of Evidence and excluding character evidence from one witness on the ground that the witness lacked sufficient knowledge to give such evidence.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Bourjaily v. *United States*, 483 U.S. 171 (1987)	9
EEOC v. *Arabian American Oil Co.*, 499 U.S. 244 (1991)	7
Foley Bros. v. *Filardo*, 336 U.S. 281 (1949)	7
Huddleston v. *United States*, 485 U.S. 681 (1988)	8
Kungys v. *United States*, 485 U.S. 759 (1988)	6
Sinclair v. *United States*, 279 U.S. 263 (1929)	4
United States v. *Carty*, 993 F.2d 1005 (1st Cir. 1993)	8-9
United States v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994), petition for cert. pending, No. 94-514	4, 5
United States v. *Johnston*, 268 U.S. 220 (1925)	5
United States v. *McMillon*, 14 F.3d 948 (4th Cir. 1994)	8
United States v. *Pugliese*, 960 F.2d 913 (10th Cir. 1992)	8
United States v. *Scarfo*, 850 F.2d 1015 (3d Cir.), cert. denied, 488 U.S. 910 (1988)	9

Statutes and rules:

18 U.S.C. 1001	4
18 U.S.C. 1623	2, 3, 4, 5
18 U.S.C. 3601	7
18 U.S.C. 3603	7
18 U.S.C. 3606	7

Rules—Continued: Page

Sentencing Guidelines (Nov. 1, 1992):
§ 5B1.4(b)(20) 6
§ 5C1.1(d)(2) 2, 6
§ 5C1.1(e)(3) 2, 6
§ 5F1.2 6
§ 5F1.2, Application Note 1 7
Fed. R. Evid.:
Rule 404(b) 8
Rule 801(d)(2)(E) 9

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-140

AMIR PORAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 17 F.3d 660. The opinion of the district court (Pet. App. A25-A54) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. A petition for rehearing was denied on April 14, 1994. Pet. App. A23-A24. The petition for a writ of certiorari was filed on July 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of making a false declaration to a grand jury, in violation of 18 U.S.C. 1623. Pet. App. A2. He received a split sentence, pursuant to Sentencing Guidelines § 5C1.1(d)(2) and (e)(3) (Nov. 1, 1992), of five months' imprisonment and five months' home detention in Israel, and he was ordered to pay a $10,000 fine. *Id.* at A55-A56. The court of appeals affirmed the conviction, but vacated the home detention portion of the sentence and remanded for the district court to require service of petitioner's home detention in the United States. *Id.* at A1-A22.

1. Petitioner, an Israeli national, manufactures medical supplies in Israel. In the early 1980s, he established a medical supply company, IM, Inc., in New Jersey. Pet. App. A2-A4. Petitioner conspired with Colin Offenhartz, the President of Fraass Survival Systems, Inc. (Fraass), to divide the worldwide market for military bandages. Petitioner agreed that his company would not submit a bid, or would submit intentionally high bids, on contracts to supply the United States Department of Defense, and Offenhartz agreed that Fraass would not compete, or would bid high, on contracts in Israel and elsewhere. *Id.* at A5. Pursuant to that agreement, Fraass intentionally submitted a high bid on a contract solicited by the Israeli government in 1984. *Id.* at A5-A6. The Israeli government required a United States supplier on the contract, however, and tried to persuade Offenhartz to lower Fraass's bid. Offenhartz and petitioner then agreed that Offenhartz would lower his price, but would pay petitioner a $200,000 "commission" from the $800,000 contract. *Ibid.* After

Fraass received payment on the contract, Offenhartz gave petitioner a $200,000 check made out to "Credit Suisse," pursuant to petitioner's instructions. *Id.* at A6.

On May 17, 1989, petitioner voluntarily appeared before a grand jury after being notified that he was a target of an antitrust investigation. Pet. App. A6, A26. In his testimony, he denied rigging bids and disclaimed any knowledge of the $200,000 check from Offenhartz. He also stated that he never had any Swiss bank account in the 1980s, and that he had never heard of Credit Suisse. *Id.* at A6, A36; C.A. Joint Appendix 1733.

Subsequently, a second grand jury indicted petitioner on two counts of knowingly making material false declarations, in violation of 18 U.S.C. 1623. Count 1 charged that petitioner had falsely told the first grand jury that he had not received a $200,000 check issued by Fraass to Credit Suisse, a Swiss bank. Count 2 charged that petitioner had falsely said that he had never had a Swiss bank account. Pet. App. A2. Credit Suisse records introduced at trial showed that petitioner had opened the account into which the Fraass check was deposited in 1984, and that he subsequently had opened two other accounts in 1987 and 1989. *Id.* at A6 n.4, A33. After the jury was unable to reach a verdict on Count 1, a mistrial was declared. The jury convicted petitioner on Count 2. *Id.* at A31-A33.

2. The court of appeals affirmed petitioner's conviction, rejecting his numerous claims of error in a footnote. Pet. App. A3 n.1. With respect to the government's cross-appeal of the sentence, the court held that the district court had erred in authorizing petitioner to serve the home detention portion of his sentence in Israel. *Id.* at A16-A22. Noting the statutory responsibility of the court and the probation office to see that petitioner complies with the terms of his sentence, the

court of appeals concluded that the only way "to maintain the required supervision" is for petitioner to "serve his complete sentence in the United States." *Id.* at A21. The court observed that if petitioner "violate[d] the conditions of home detention * * * the district court might find it difficult, or even impossible, to bring [petitioner] before it to consider appropriate remedial measures."[1] *Ibid.*

DISCUSSION

1. Petitioner contends (Pet. 13-23) that the courts below erred in holding that the materiality of a false declaration, in violation of 18 U.S.C. 1623, is a question of law for the court. He further argues that that ruling conflicts with the decision in *United States* v. *Gaudin*, 28 F.3d 943 (9th Cir. 1994) (en banc), petition for cert. pending, No. 94-514 (filed Sept. 19, 1994), in which the Ninth Circuit held that the issue of materiality in a prosecution for making a false statement in a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001, is an issue of fact for the jury. Our certiorari petition in *Gaudin* challenges the Ninth Circuit's holding on materiality, and we believe that the petition in this case should be held pending the Court's disposition of our petition in *Gaudin*.

In our view, the courts below correctly treated the issue of materiality in this case as an issue of law for determination by the court. See *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929) ("the materiality of what

---

[1] The court rejected the government's contention that the district court had erred in failing to enhance petitioner's sentence for attempting to obstruct justice. Pet. App. A9-A16. While indicating that it "might draw a different conclusion from the evidence," the court held that the district court's findings were not clearly erroneous. *Id.* at A16.

is falsely sworn, when an element in the crime of perjury, is one for the court"). The Ninth Circuit's holding in *United States* v. *Gaudin*, *supra*, does not squarely conflict with the decision in this case, because *Gaudin* did not involve Section 1623 and did not overrule existing Ninth Circuit precedent holding that materiality under Section 1623 and other perjury statutes is a question of law for the court. Nevertheless, if the Court grants certiorari in *Gaudin* and reviews the Ninth Circuit's holding, the Court's analysis is likely to illuminate the considerations relevant to determining whether the court or the jury is the appropriate body to determine materiality in a prosecution under Section 1623. Accordingly, the Court should hold the petition in this case pending its disposition of *Gaudin*, and should then dispose of this petition as is appropriate in light of that case.

2. Petitioner next contends (Pet. 23-30) that the record in this case does not support the district court's finding that his false denial about whether he had a Swiss bank account was material. That question involves only the specific record in this case and therefore is not of sufficient general importance to warrant review by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). In any event, the record fully supports the district court's determination that petitioner's false statement was material to the grand jury's investigation.

Contrary to petitioner's assertions (Pet. 24, 26, 29), the grand jury before which petitioner testified was investigating bid rigging. Pet. App. A6, A35-A36; C.A. Joint Appendix 1678. The question whether petitioner had a Swiss account into which money was paid in furtherance of a bid-rigging arrangement was material to the grand jury's investigation. Moreover, as the trial

court found, petitioner's denial of the existence of the Swiss bank account "contradicted the earlier grand jury testimony of the President of Fraass, Colin Offenhartz," and petitioner's testimony thus "had a natural tendency to cast doubt on the credibility of Offenhartz's testimony, and to foreclose the grand jury's line of inquiry in questioning [petitioner]." Pet. App. A36. Applying the standard of whether the misrepresentation had "a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed," *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (internal quotation marks omitted), materiality was established.

3. Petitioner contends (Pet. 30-31) that the court of appeals erred in vacating the district court's sentence of five months' home detention in Israel, imposed pursuant to Sentencing Guidelines § 5C1.1(d)(2) and (e)(3) (Nov. 1, 1992), as part of petitioner's minimum 10-month sentence of "imprisonment."[2] That contention lacks merit.

As the court of appeals held (Pet. App. A19-A21 & n.17), the probation office cannot reasonably supervise the conditions of home detention provided in this case unless home detention is served in the United States. The relevant statutes and Sentencing Guidelines provisions

---

[2] As the court of appeals noted (Pet. App. A19-A20 & n.18), the provision for home detention is not the type of "discretionary" condition that a court may impose as a condition of probation following imprisonment (see Pet. 30-32). Part C of chapter 5 of the Sentencing Guidelines, under which home detention was imposed here, is titled "Imprisonment," and it is distinct from "Probation" (Part 5B) and "Supervised Release" (Part 5D). See also Sentencing Guidelines §§ 5B1.4(b)(20), 5F1.2 (Nov. 1, 1992) ("[h]ome detention may be imposed as a condition of probation or supervised release, *but only as a substitute for imprisonment*") (emphasis added).

are based on the assumption that a defendant sentenced to home detention will remain within the jurisdiction of a United States court and probation office.[3] No statute or Guidelines section provides for supervision by a foreign government or, as would be the case here (Pet. 38), by a private business firm operating in a foreign country. Those entities have no authority or responsibility under United States law to ensure compliance with the conditions of home detention or to bring petitioner to justice before a federal court if he violates the terms of the sentencing order. As the court of appeals thus found (Pet. App. A20), "[e]ven with this [electronic] monitoring [to be provided by an American company], there is no substitute for the supervisory role performed by the probation officer."[4]

---

[3] A probation officer is required to supervise the terms and conditions of probation or supervised release. 18 U.S.C. 3601. Among other things, the probation officer must monitor the conduct of a releasee and immediately report any violation of the conditions of release to the court and the Attorney General. 18 U.S.C. 3603. If there is probable cause to believe a person has violated a condition of his release, he may be arrested by a probation officer with or without a warrant and taken before the court having jurisdiction over him. 18 U.S.C. 3606. The Sentencing Guidelines, moreover, define "home detention" as "a program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance *by the probation office*." Guidelines § 5F1.2, Application Note 1 (emphasis added).

[4] In addition, this Court consistently has held "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949)). Because Congress has not specifically authorized the home detention portion of a split sentence to be served in a foreign country, the district court

There is no conflict between the court of appeals' decision and *United States* v. *Pugliese*, 960 F.2d 913 (10th Cir. 1992). See Pet. 36-37. While the court in *Pugliese* suggested in dictum that it did not see any "direct impediment to authorizing a person on supervised release to leave the United States" (960 F.2d at 915), the court in fact denied a defendant's motion to serve his supervised release in Thailand. The court concluded that "the structure needed to support defendant's rehabilitative supervision is absent outside the United States," and stated that "[w]e are unaware of any U.S. federal administrative system in Thailand that is empowered or trained to provide the functions of a U.S. probation officer." *Id.* at 916. That is similar to the reasoning of the court of appeals in this case.

4. Petitioner contends (Pet. 40-46) that the trial court made several erroneous evidentiary rulings. Those rulings do not conflict with the decisions of any other court and do not involve any issue warranting review by this Court.

a. The trial court properly admitted evidence of petitioner's bid rigging under Fed. R. Evid. 404(b). Evidence concerning the bid-rigging conspiracy was admitted as background to explain the relevance of the grand jury inquiry into petitioner's knowledge of the $200,000 check and the Swiss account into which the check was deposited. Pet. App. A5-A6, A36-A39. The district court did not abuse its discretion in admitting the evidence for that purpose under Rule 404(b). See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 686 (1988); *United States* v. *McMillon*, 14 F.3d 948, 954 (4th Cir. 1994); *United States* v. *Carty*, 993 F.2d 1005, 1011

---

lacked authority to give the home detention provisions of domestic law extraterritorial effect.

(1st Cir. 1993); *United States* v. *Scarfo*, 850 F.2d 1015, 1019 (3d Cir.) (en banc), cert. denied, 488 U.S. 910 (1988). While petitioner suggests that various courts of appeals have articulated the rule for admitting "other acts evidence" somewhat differently (Pet. 44-46), petitioner has not shown that any of those variations in phraseology would have resulted in exclusion of the bid-rigging evidence in this case.

b. Petitioner next suggests (Pet. 42-43) that evidence of bid rigging was admitted through improper hearsay. The challenged evidence, however, was properly admitted as nonhearsay under the provision for admitting the declarations of co-conspirators, Fed. R. Evid. 801(d)(2)(E). The existence of a bid-rigging conspiracy was independently proved by the testimony of co-conspirator Colin Offenhartz and by a letter that petitioner wrote describing the bid-rigging arrangement. C.A. Joint Appendix 1841. Thus, contrary to petitioner's suggestion (Pet. 42-43), the question left open by *Bourjaily* v. *United States*, 483 U.S. 171, 181 (1987)—whether a court can rely on Rule 801(d)(2)(E) evidence alone to determine that a conspiracy has been established by a preponderance of the evidence—is not presented in this case.

c. Finally, petitioner's claim (Pet. 43) that he was denied the opportunity to present evidence of his good character is incorrect. C.A. Joint Appendix 547 (court expressly states that defendant is not precluded from presenting evidence of his good character, whether or not he testifies in his own defense). Contrary to petitioner's contention, he was permitted to elicit evidence from the witness in question, Bernard Laderman, regarding petitioner's reputation in the United States. C.A. Joint Appendix 893-895, 928-929. The only limitation on Laderman's testimony was that he was not

permitted to testify concerning petitioner's reputation for good character in Israel. That restriction was entirely justified, because Laderman, who did not speak Hebrew, had made only one brief visit to that country. C.A. Joint Appendix 900. Moreover, while petitioner called as witnesses several Israelis who would have been qualified to testify about his reputation in Israel, petitioner did not try to elicit that information from them.

CONCLUSION

With respect to the first question presented, the Court should hold the petition pending its consideration of the petition for a writ of certiorari in *United States* v. *Gaudin*, No. 94-514. With respect to the other questions presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

JOHN J. POWERS, III
ANDREA LIMMER
Attorneys

SEPTEMBER 1994